

TRANSFORMING CRIME-BASED DEPORTATION

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Why not rid the United States of criminal noncitizens and the disorder they cause? Because, scholars urge, immigrants reduce crime rates, deporting noncitizens with criminal convictions costs far more than it is worth, and discarding immigrants when they become inconvenient is wrong. Despite the force of these responses, reform efforts have made little headway. Crime-based deportation appears entrenched. Can it be transformed, rather than modified at the margins?

Transformation is possible, but only if crime-based deportation is reenvisioned as the prerogative of local governments. National transformation, this Article shows, is a dead end. When the problem of immigrant crime is digested at the national level, under the rubric of “the national interest”—where noncitizen interests do not count by definition—there are numerous “rational” reasons why a self-interested citizenry would want to deport noncitizens, even for minor crimes. Additionally, whatever rational reasons exist are exaggerated by the national media, which gives the rare violent crime committed by an immigrant outsized national attention. The danger posed by this distorted media reality was highlighted by Donald Trump throughout his campaign for president. Trump’s establishment of an office to publicize crimes committed by deportable noncitizens will make the problem more acute.

Local governments, by contrast, can be more concrete, flexible, and pragmatic; they are apt to think in terms of residents and community, rather than citizen versus alien. Local residents think about neighbors, classmates, and fellow churchgoers, and the economic and social contributions of noncitizens who run afoul of the law loom larger in the local calculus than the national one. Were local governments granted responsibility for crime-based deportation, the humanity, value, and membership of immigrants who commit crimes would be more likely to enter the conversation about appropriate responses, helping to transform crime-based deportation.

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INTRODUCTION

For European immigrants who lived from the Great Depression through the post-war period, immigration to the United States was effectively an unconditional promise.¹ Immigrants who committed fraud, rape, or murder—along with immigrants who had entered the United States illegally—were forgiven their trespasses and allowed to remain a part of the American community.² Not anymore. Today we “increasingly handle[] migration control through the criminal justice system;”³ contact with the criminal justice system is now one of the

¹ My use of “unconditional” in this Article is aspirational, even in its characterization of the historical record. See *infra* note 69 and accompanying text (describing how unconditional membership was conferred on European immigrants and denied to Hispanic immigrants). I use “unconditional” this way to encapsulate the idea that an immigrant’s presence in the United States should be irrevocable, in language similar to open-textured, ever-unfulfilled constitutional principles like the equal protection of laws. I use this device—unconditional membership, unconditional ethic—as a way of clearly linking disparate scholarly projects related to crime-based deportation that appear to be driven by similar normative premises. These premises often go unmentioned in the literature or take on various guises, perhaps because they lack a unified legal footing in the Constitution’s text.

² See *infra* Part I (describing crimes that were interpreted by the Immigration and Naturalization Service to not render a noncitizen deportable).

³ Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009) (describing the transformation of immigration law enforcement from a civil regime distinct from the criminal law to one that operates as an adjunct to criminal enforcement and punishment).

primary ways the United States determines which immigrants are unfit to remain in the country.⁴

In response to this dramatic shift, scholars created a new field of study: crimmigration.⁵ Railing against the “immigration-criminal convergence,”⁶ academics have lodged an array of objections to crime-based deportation. They argue that immigrants actually lower crime rates, and also insist that crime-based deportation⁷ does not reliably identify immigrants who are unfit to remain in the United States, since the system is wildly overinclusive⁸—jumping a subway turnstile can

⁴ See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 371 (2006) (describing the connection between criminal convictions and the deportations of noncitizens).

⁵ Juliet Stumpf and Teresa Miller started the avalanche of crimmigration scholarship, which now has its own international conference. See generally Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 614 (2003) (linking the “harsh immigration reforms adopted both pre- and post-9/11 . . . [to] the severity revolution within crime control”); Stumpf, *supra* note 4, at 377 (describing the origins of “the confluence of criminal and immigration law”).

⁶ See Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 110 (2012) (“[T]he convergence of U.S. criminal and immigration enforcement has persisted, despite the fact that it does much harm and relatively little good, because it serves to alleviate two forms of pervasive cognitive dissonance . . . one form of dissonance involves economic unease, and the other, racial anxiety.”).

⁷ In this Article, I use “crime-based deportation” to denote a variety of distinct grounds on which noncitizens are deported. This concept is intended to capture the deportation of undocumented immigrants who are placed into deportation proceedings because of criminal inquiries or arrests, as well as the deportation of lawful permanent residents (LPRs) like Jose Padilla, whose deportation proceedings were triggered after a guilty plea to a drug-related offense he made after many decades of living in the United States. *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010). While I claim that unconditional membership is foreclosed at the national level for the entire spectrum of noncitizens who make contact with the criminal justice system, the possibility of refraining from deportation at the local level is likely to differ by category. LPRs with relatively minor nonviolent criminal infractions are most likely to gain unconditional membership, while undocumented immigrants who commit serious violent offenses may fare least well. In an article less focused on the political dynamics of crime-based deportation, such wide distinctions among groups might require a more precise set of labels. I paint with a broad brush because these disparate groups are commonly lumped together in political discourse, with the least sympathetic groups being used to justify harsh legal treatment of all noncitizens, or even used as a basis for lowering immigration levels. President Trump’s recent executive actions on immigration are a prominent example of this tendency. Although frequently invoking the dangers of undocumented people committing crimes, his Department of Homeland Security (DHS) guidance memo drastically expanded the list of people potentially vulnerable to deportation regardless of whether they were documented or not. See Exec. Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017) (expanding the enforcement priorities of the DHS to include “any removable aliens” who may have been charged with a crime, may have committed acts that could “constitute a chargeable criminal offense,” and who may have committed fraud before a governmental agency).

⁸ See Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 81 (2013) (noting “problems with overbreadth in immigration investigation and criminalization”).

result in deportation⁹—and relies on arrest, rather than conviction, to trigger deportation.¹⁰ Crime-based deportation has also been criticized for failing to take full account of an individual immigrant’s social value, and for refusing to consider how the benefits the immigrant provides to society may offset the harm caused by the immigrant’s crime.¹¹ Scholars have also objected to the crime-based deportation system’s limited procedural protections and picayune doctrinal distinctions, which some argue diminish the system’s capacity to sort “good” from “bad” immigrants, violating their rights along the way.¹² Critiques and prescriptions are numerous and vary, but the heart¹³ of the crimmigration literature’s normative aspiration is to resurrect the lost ethos of unconditional membership in the American community, to return immigration to the generous promise that it once was: a promise capable of accommodating human frailty.¹⁴ This Article

⁹ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939–41 (2000) (noting that subway turnstile-jumping could result in deportation under the enhanced “aggravated felony” deportation statutes).

¹⁰ See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–49 (2011) [hereinafter *The Discretion That Matters*] (discussing the way arrests for non-immigration crimes result in an information cascade that ends with the deportation of the immigrant for civil immigration infractions).

¹¹ See Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1709 (2011) (arguing that crime-based deportation ignores factors that would otherwise be taken into account in deportation cases and makes the immigrant’s crime the dispositive factor).

¹² See Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1725–42 (2011) (describing how the adoption of the modified-categorical approach to determining which criminal convictions render an immigrant deportable has caused substantial violations of immigrants’ due process rights); Morawetz, *supra* note 9, at 1938–43 (cataloguing the ways that changes to crime-based deportation law have expanded the list of deportable immigrants to include many people who pose little to no criminal risk).

¹³ I realize, of course, that even within the community of crimmigration scholars, which tends to be very pro-immigrant and pro-immigration, there is no consensus view on whether crime-based deportation is legitimate at all, or to what degree it is legitimate. Compare Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 461 (1999) (advocating for the deputization of local law enforcement directly to enforce national immigration priorities), with Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732 (2009) (advocating for proportionality in use of crime-based deportation) and Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1261 (2014) [hereinafter Morales, *Crimes of Migration*] (arguing that immigration crimes are illegitimate). I use “heart” and “aspiration” to signal that aspiring towards unconditional membership is a modal value in the field. This rough characterization also stems from a lack of scholarship delineating a “just” crime-based deportation system. Given the relative novelty of the field, scholars have properly focused on describing the crimmigration system and critiquing it.

¹⁴ See *infra* notes 59–63 and accompanying text (describing how unconditional membership thrived in the past). César Cuauhtémoc García Hernández has also called for

argues that progress towards unconditional membership, or some feasible approximation of it, is more likely to emerge if crime-based deportation is reenvisioned as the prerogative of local governments.¹⁵ To give unconditional membership new life, scholars should design, and activists should seek, reforms that decentralize the crime-based deportation power, pushing it “all the way down”¹⁶ to the local level where the transformative possibilities lie.

Reorienting the crime-based deportation power at the local level is a second-best reform necessitated by the impossibility of achieving unconditional membership (or any near approximation) at the national level. This pessimistic view of national reform emerges from this Article’s skeptical analysis of the core critiques of crime-based deportation. When we take the structural facts of national immigration politics seriously—the belief that immigration law exists for the benefit of the citizenry, and the citizenry itself defines what counts as

the development of an immigration ethic grounded in forgiveness. See César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 296–97 (2017).

¹⁵ Other authors have suggested decentralization of the crime-based deportation power, but with dramatically different goals in mind, and using very different normative starting points. Nonetheless, this Article builds on that prior work. Ultimately, that decentralization of the immigration power commands support from a variety of normative premises that make the case for decentralization more robust. Prior scholarship and reform prescriptions in this area have focused on increasing the efficiency or capacity of the crime-based deportation system (i.e., on facilitating more deportations)—not, as I do, on enhancing immigrants’ rights to remain in the United States. See Schuck & Williams, *supra* note 13 (advocating for the deputization of local law enforcement directly to enforce national immigration priorities); Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 109–10 (2014) (suggesting a policy where localities dictate deportation priorities, but the national government sets the overall number of deportees as a way of optimizing the deportation apparatus). Neither Schuck nor Treyger would grant sanctuary jurisdictions the full ability to shield an immigrant with criminal convictions from deportations in unlimited numbers, as I would. This grant of full policy autonomy to localities is what makes the delegation I imagine in Part III capable of enhancing unconditional membership and increases the likelihood that local jurisdictions will wield their power responsibly, since they have to face the violence of their decisions should they choose to deport. See also Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 904–15 (2015) (articulating the pro-immigrant possibilities of state law). While states are the more natural location for decentralization, given their broad police powers, the national government’s plenary authority over immigration should allow it to delegate authority over immigration directly to localities, rather than to states, and even perhaps to preempt states from changing local boundaries, at least for these purposes. See, e.g., *Tennessee v. Fed. Comm’ns Comm’n*, 832 F.3d 597, 610 (6th Cir. 2016) (holding that Congress may delegate discretion to a state’s political subdivision and override the state’s preferences if Congress expresses a clear intent to do so by statute). Elaboration of the doctrinal and political difficulties of such a delegation is beyond the scope of this Article. In any event, while I prefer local delegation, state control would likely still be superior to the centralized status quo.

¹⁶ See Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8 (2010) (theorizing a broader account of federalism that includes the “power . . . of the servant,” or the power of sublocal entities to deviate from commands issued on high).

a benefit—crime-based deportation, even for minor crimes, looks quite rational.¹⁷ As immigration scholar Peter Schuck emphasizes: “It is hard to think of any public policy that is less controversial than the removal of criminal aliens.”¹⁸ And Schuck’s statement is certainly correct if immigrant crime is framed as a national problem that demands a centralized solution, rather than an infinitely varying challenge involving human beings who live, work, play, pray, and learn in thousands of distinct neighborhoods, and who *also* have committed a crime. But the national lens¹⁹ is not the only lens, and the national government is not the only government around which to organize the power to deport—or forgive—noncitizens who have committed crimes. If we were to turn localities into autonomous authors of local crime-based deportation law, rather than servants of national priorities, many local governments and many local communities would be better able to see through the label “criminal alien” and embrace and forgive a member of their community.²⁰

Since Donald Trump’s inauguration, we have seen the power and potential of the local mindset. Reporters have recounted stories of Trump voters who express opposition to the deportation of specific noncitizen neighbors, even as they continue to support a crackdown

¹⁷ See, e.g., Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 812 (2007) (organizing their analysis of methods of screening immigrants around the assumption that immigration law should seek to maximize the welfare of the “self-interested state”).

¹⁸ Schuck & Williams, *supra* note 15, at 372.

¹⁹ James C. Scott emphasizes the ways that the point of view of national administrators and politicians is “necessarily schematic” and “always ignores essential features of any real, functioning social order.” JAMES C. SCOTT, *SEEING LIKE A STATE* 6 (1998). Granular, particularistic, local knowledge is always lost in the nation’s-eye view. Of course, seeing social and economic life from this point of view is necessary to a certain extent in well-run, democratic societies, but it can lead to catastrophe under authoritarian conditions. Part I applies Scott’s methodology to the crime-based deportation regime, showing its “rationality” from the perch of the self-interested nation-state. Part III’s case for the local can also be seen, in Scott’s terms, as an effort to recover what was lost in the creation of a schematic, nation’s-eye view. Taken together, these arguments show that there is a symmetry between local modes of thinking and the fundamentally humanistic arguments that critics of crime-based deportation make in favor of transformation.

²⁰ This argument is an extension of my prior work calling for a new immigration reform agenda that moves from the bottom up, rather than the top down. See Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49 (2013) [hereinafter *Democratic Will*] (arguing that reliance on courts to quash local anti-immigrant rebellions sows the seeds for a national anti-immigrant rebellion, and that more durable immigration reform requires the design of institutions that force citizens to understand the difficult, concrete tradeoffs that immigration policy entails); see also *infra* Part III (describing the advantages of a decentralized crime-based deportation system).

on “illegal” immigration and “criminal aliens” in the abstract.²¹ For example, in West Frankfort, Illinois, a coal-country town where seventy percent of voters supported Trump, locals were stunned and outraged when Juan Carlos Hernandez Pacheco—a pillar of the local community—was taken into immigration custody.²² “I knew he was Mexican, but he’s been here so long, he’s just one of us,” one resident said.²³ Another resident who was leading the effort to free Carlos, as he is known to locals, confessed he would still vote for Trump, “but maybe [deportation decisions] should all be more on a per-case basis It’s hard to be black and white on this because there may be people like Carlos.”²⁴

Denationalizing crime-based deportation would resolve this cognitive dissonance between local and national frames of mind by de-emphasizing the othering, national frame that marks “illegal” and “criminal” noncitizens as aliens and foreigners.²⁵ Local control would focus the crime-based deportation calculus on the local communities where noncitizens’ contributions, costs, and community ties are most keenly felt.²⁶

Capitalizing on the concreteness of noncitizens’ local ties is key to transforming crime-based deportation because unconditional membership is really about citizens taking ownership over noncitizens’ human frailty and the criminal risk inherent in that frailty, rather than exporting that risk to the noncitizen’s country of origin. This embrace of risk—however minimal in fact—and this restraint in the use of available power requires the persuasion of the citizenry on a more intimate scale, and in the context of a less abstract formula than “the national interest.” For example, many West Frankfort locals shrugged off Carlos’s two DUI convictions because they considered him to be “one of us.”²⁷

²¹ See, e.g., Monica Davey, *He’s a Local Pillar in a Trump Town. Now He Could Be Deported*, N.Y. TIMES (Feb. 27, 2017), <https://nyti.ms/2IKW7B6> (describing one such story).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See NANCY L. ROSENBLUM, *GOOD NEIGHBORS: THE DEMOCRACY OF EVERYDAY LIFE* 163–65 (2016) (describing the way that nationally prescribed and administered internment of Japanese Americans “deranged” the neighborly ethic that allowed Japanese and white Americans to live together side by side: Internment policies forced neighbors to view “the family next door . . . through the lens of racial and political categories, and through the miasma of mistrust thrown up by war”).

²⁶ See Treyger, *supra* note 15, at 123–24, 140 (describing the wide variation in local costs and benefits of immigrant presence).

²⁷ Davey, *supra* note 21.

When we ignore the local and view crime-based deportation through a national lens, the humanity of immigrants who commit crimes is readily erased, along with the possibility of embracing that humanity rather than tossing it aside in favor of deportation. Additionally, the probability of embrace rather than rejection is higher at the local level in part because of the diversity of local cultures and conditions. There can be only one “national interest,” but local communities are various, and the place of immigrants in those communities is equally diverse. That diversity presents opportunities to create new political formations capable of embracing policy in the direction of unconditional membership. Local governments also operate on a more human scale.²⁸ Levels of government that operate on a more human scale and are responsible for concerns more concrete than “the national interest” may be capable of adopting something closer to unconditional membership than the technocratic confines of Washington D.C.²⁹ This Article shakes up settled assumptions about which level of government ought to deploy—or at least author—the deportation power, and thereby contributes to the progressive federalism literature. Ever since scholars such as Cristina Rodríguez brought thoughtful attention to the importance, power, and possibility of “the local” in immigration law,³⁰ the study of “immigration federalism,” and local power in particular, has received sustained atten-

²⁸ By “human scale,” I simply mean that local governments are more accessible to constituent input and advocacy because they are smaller. While local governments today are often a far cry from the deliberative democratic ideal of the New England townhall meeting, they are often far more accessible than the federal government at the national level. Even very large local governments, like the City of Chicago, provide structural mechanisms—fifty aldermen represent wards of about 60,000 residents—to facilitate close contact between constituents and representatives. See Greg Hinz, *Census Finds Huge Changes in Chicago Wards’ Population*, CRAIN’S CHI. BUS. (Feb. 22, 2011), <http://www.chicagobusiness.com/article/20110222/BLOGS02/302229995/census-finds-huge-changes-in-chicago-wards-population> (discussing average ward size).

²⁹ The reactions of local governments to climate change illustrates this point. Resolution of the climate change issue at the national level requires first-order agreement on whether climate change is “real” or not. Yet localities experiencing the concrete effects of climate change have no trouble taking action to mitigate those local effects with local governmental action, even in locales where the majority of residents are climate change deniers. See Henry Grabar, *A Threat by Any Other Name*, SLATE, (Mar. 6, 2017), http://www.slate.com/articles/business/metropolis/2017/03/cities_are_throwing_out_climate_change_in_favor_of_resilience.html (describing efforts in more conservative localities to combat climate change). Local action can be taken in response to local effects even under conditions of deep political disagreement about the underlying cause of the condition to be remedied. In this way, local control can facilitate what Cass Sunstein has called “incompletely theorized agreements,” decisions that resolve the issue at hand without resolving the first-order disagreement. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

³⁰ Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

tion.³¹ Still, national control and the allure of uniformity exert a hold over immigration scholars, perhaps especially for those who focus on crimmigration.³² The appeal of centralized law and policy is understandable. For much of the last decade, there was plenty of evidence illustrating that many localities wanted to treat noncitizens—“criminal” or otherwise—much worse than the federal government was willing to. The federal courts, the President, federal enforcement agencies, and a deadlocked Congress, were all viewed as safer, more stable ground on which to pursue a reform agenda.³³ But this Article, and Donald Trump’s election, cast significant doubt on scholars’ faith in national, technocratic power, especially the faith of scholars and activists disinclined to marginal reforms.

The case for reimagining the relationship between national and local has also grown stronger as scholars have proven that local control of crime-based deportation is already the de facto law of the land.³⁴ The practice of local control is asymmetric, however. The lack of local policymaking autonomy prejudices pro-immigrant jurisdictions. These “sanctuary cities,”³⁵ local jurisdictions which refuse to follow Washington’s draconian crime-based deportation commands, are held back by the national stranglehold on immigration law and policy, while anti-immigrant jurisdictions are empowered by it.³⁶ New York and Chicago can resist the federal government’s efforts at cooptation, but they cannot stop federal officials from using their own extensive resources to deport noncitizen New Yorkers or

³¹ See *infra* note 230 and accompanying text (collecting and contextualizing the immigration federalism literature).

³² See Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787 (2010) (exhibiting a preference for a national immigration system); see also Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (advocating for national reforms to the immigration system).

³³ See *id.*

³⁴ Treyger, *supra* note 15, at 144–68 (discussing how sub-federal subversion of federal policy occurs on the ground); see also Motomura, *supra* note 10 (describing local enforcement of immigration policy).

³⁵ See *infra* note 255 and accompanying text (collecting literature on sanctuary jurisdictions). While there are many ways one can define a “sanctuary” jurisdiction, for my purposes any local jurisdiction that acts in favor of immigrants and against federal mandates is a “sanctuary.” This broad definition is important for this piece, because what matters most about sanctuaries, in terms of building norms of unconditional membership, is that they have been willing to fight the federal government. This fighting stance on an issue affecting disenfranchised minorities suggests that a grant of policy autonomy to such locations would permit the further expansion of unconditional membership in those jurisdictions.

³⁶ See *infra* Part III (describing this phenomenon).

Chicagoans.³⁷ Meanwhile, anti-immigrant jurisdictions—sovereign citadels—effectuate local crime-based deportation policies that enforce immigration laws at rates far above the national mean.³⁸ Decentralized authority over crime-based deportation, this Article shows, would correct this asymmetry and reinforce the pro-immigrant ethic of sanctuary jurisdictions by granting them the autonomy to deepen their commitments to noncitizens by affirmatively protecting them from deportation, and doing so in a way that has more democratic legitimacy than reform from on high.³⁹ The immunity of sanctuary jurisdictions to nativist sentiment is a precious and fragile trait that ought to be preserved and strengthened, even perhaps at the cost of leaving other jurisdictions room to press more atavistic impulses.⁴⁰

Local autonomy over crime-based deportation policy may also improve the ability of the immigration system to withstand periodic shocks of anti-immigrant animus, since anti-immigrant laws and policies are more easily reversed at the local level than at the national level.⁴¹ The responsiveness and flexibility of localities make them open to the immigrants' rights advocacy that can emerge in response to local anti-immigrant laws, policies, and actors.⁴² Just this November, residents of Maricopa County, Arizona, one of the most anti-immigrant jurisdictions in the country,⁴³ ousted Joe Arpaio, the

³⁷ See, e.g., Daniel Denvir, *The False Promise of Sanctuary Cities*, SLATE (Feb. 17, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/the_false_promise_of_sanctuary_cities.html (discussing how the Trump Administration began an “end run” around sanctuary cities like Austin by using federal arrest warrants instead of U.S. Immigration and Customs Enforcement (ICE) detainers, thus requiring that immigrants be detained and handed over to federal custody).

³⁸ See generally Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013) (describing the various methods anti-immigrant localities use to increase deportations and the limited tools that pro-immigrant localities have to effect their policy preferences).

³⁹ See Morales, *Democratic Will*, *supra* note 20, at 82–92 (discussing how and why demand for immigration reform needs to be built through small-scale persuasion and concrete, informative encounters between citizens and noncitizens).

⁴⁰ The Constitution will, of course, still set a national floor of fair treatment for noncitizens. Moreover, as I argue in Section III.D, *infra*, responsibility and ownership over crime-based deportation policy may moderate the actions of less immigrant-friendly jurisdictions.

⁴¹ See *infra* Section III.D.

⁴² This activism is usually aided by litigation aimed at enforcing a constitutionally mandated floor of fair treatment towards suspected noncitizens. See Complaint at 3–4, *Melendres v. Arpaio*, No. CV 07-02513-PHX-MHM (D. Ariz. July 16, 2008).

⁴³ See Valeria Fernández, *Immigrants in Arizona Face Resistance to Getting Visas After Being Victims of Crimes*, PRI (Oct. 27, 2012, 10:30 AM), <https://www.pri.org/stories/2012-10-27/immigrants-arizona-face-resistance-getting-visas-after-being-victims-crimes> (describing lingering anti-immigrant sentiment in Maricopa County).

most infamous anti-immigrant sheriff in the nation.⁴⁴ This local victory for immigrant advocates occurred even as Donald Trump used Arpaio's rhetoric to ascend to the presidency.⁴⁵ Another example: California is now the most pro-immigrant jurisdiction in the United States, but it was once a pioneer in *anti-immigrant* politics.⁴⁶ Indeed, California's decades-old immigration enforcement innovations, like making the ability to work contingent on immigration status,⁴⁷ are today deeply entrenched at the national level,⁴⁸ even as Californians' attitudes towards immigrants have flipped.⁴⁹ The reversibility of local law and policy is a significant asset. At the national level, episodes of anti-immigrant animus have moved crime-based deportation law along a one-way ratchet of escalating harshness.⁵⁰

Immigrant crime and crime-based deportation are not going away and are becoming more salient in the political conversation. Since his election, Donald Trump has drastically expanded the priorities for immigration enforcement against immigrants who brush-up against the criminal justice system.⁵¹ To help justify this expansion, Trump has ordered publication of weekly lists of all crimes committed by immigrants in jurisdictions that do not honor detainer agreements, and established an office to advocate for victims of "crimes committed by

⁴⁴ See Colby Itkowitz, *She Helped Bring Down Sheriff Arpaio. Now She's Ready to Take on Hate Nationally*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/news/inspired-life/wp/2016/11/22/she-helped-bring-down-sheriff-arpaio-now-shes-ready-to-take-on-hate-nationally/?utm_term=.B58c02735a8b (describing Arpaio's anti-immigrant stance and subsequent election loss).

⁴⁵ *Id.* ("Trump, in turn, lavished praise on Arpaio, telling a crowd in late October, 'He is a good man, he was one of the first endorsers of Donald Trump. Vote for Sheriff Joe!'").

⁴⁶ See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 555–57 (1996) (describing the anti-immigrant politics in California in the mid-1990s).

⁴⁷ See Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1364 (2013) ("California . . . enact[ed] the first employer sanction law in the nation in 1971 . . . [making] it illegal for employers to 'knowingly employ an alien . . . not entitled to lawful residence in the United States.'").

⁴⁸ See *id.* at 1365 (describing how, within days of the passage of California's employer sanction statute, Congress introduced a similar bill and held two days of hearings). Congress would go on to codify employer sanctions in 1986. See Immigration Reform and Control Act of 1986, Pub. L. 99-603, §§ 101–103, 100 Stat. 3359, 3360–80 (criminalizing employment of undocumented people).

⁴⁹ See Wendy Feliz, *California Leads the Transition in Pro-Immigrant State Lawmaking*, AM. IMMIGR. COUNCIL: IMMIGR. IMPACT (May 15, 2015), <http://immigrationimpact.com/2015/05/18/california-leads-the-transition-in-pro-immigrant-state-lawmaking/> (describing how California "has transformed itself from a leader in anti-immigrant policymaking . . . to a leader in providing creative, forward-thinking policies on immigration").

⁵⁰ See *infra* Section III.A (describing this phenomenon).

⁵¹ Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

removable aliens.”⁵² Together, these moves institutionalize what was once a marginal right-wing obsession. The political deployment of these exceptions to the rule that immigrants are not criminals poses a direct threat to expanding the reach of unconditional membership norms. Trump has weaponized the politics of immigrant crime, but he did not invent this distorting tactic. At the edges of the internet, Tea Party activists have been building virtual memorials to “victims of illegal alien crime” for a number of years.⁵³ Some relatives of victims of such crimes have become vocal advocates of immigration restriction and draconian immigration enforcement policies.⁵⁴ Now President Trump has embraced many of these initiatives. In light of these developments, the near term possibility of unconditional membership at the national level is all but dead, and the need to imagine different solutions is urgent.

This Article proceeds in three Parts. Part I picks apart the core critiques of crime-based deportation in order to show their deep incompatibility with working notions of the national interest, or the “self-interested state.”⁵⁵ Many of these critiques try to show how refraining from crime-based deportation is in the national interest, but they are ultimately unconvincing.⁵⁶ When we stay the hand of deportation for noncitizens who commit crimes, noncitizens themselves are the clear beneficiaries—not the self-interested nation. Part II locates the central challenge of achieving unconditional membership for noncitizens in the fundamental mystery of human character. We simply cannot know in advance how a noncitizen will behave and contemplating that uncertainty in a national frame of mind can be terrifying for citizens. Yet the same facts can be dealt with more clinically in a mindset framed by friendship and neighborliness, rather than citizenship and alienage. Finally, in Part III, this Article imagines how a lurid immigrant crime might play out in a centralized versus fully decentralized crime-based deportation system, and shows that were localities given autonomy to decide their own crime-based deporta-

⁵² *Id.* at 8801.

⁵³ See, e.g., FOREIGN NAT’L CRIME INFO. CTR.-VICTIMS OF ILLEGAL ALIEN CRIME MEMORIAL, <http://www.fncic-voiacm.org/> (last visited Jan. 22, 2017) (purporting to catalog victims of crimes committed by noncitizens); OHIO JOBS & JUST. PAC, VICTIMS OF ILLEGAL ALIENS MEMORIAL, <http://www.ojjpac.org/memorial.asp> (last visited Jan. 22, 2017) (same).

⁵⁴ See Jonathan Blitzer, *The Hard-liners Standing Behind Trump Against Sanctuary Cities*, NEW YORKER (Jan. 30, 2017), <http://www.newyorker.com/news/news-desk/the-hard-liners-standing-behind-trump-against-sanctuary-cities> (discussing the Remembrance Project, a group designed to create a national platform for families of those killed by undocumented immigrants).

⁵⁵ See Cox & Posner, *supra* note 17 and accompanying text.

⁵⁶ See *infra* Section I.A.

tion policy, we could reasonably expect a significant number of jurisdictions to stay the hand of deportation and resist the temptation to respond disproportionately to immigrant crimes. Our centralized system, by contrast, is far less resilient: A single dramatic tale of an immigrant crime can cause dramatic shifts in immigration enforcement that reverberate nationwide.⁵⁷ The policy pluralism of a decentralized system protects against such dramatic swings, preserving space for the development of unconditional membership.

I realize, of course, that there are very significant political barriers to decentralizing the crime-based deportation power,⁵⁸ just as there are obstacles to transforming crime-based deportation at the national level. While my argument for devolution has value even as a purely theoretical prospect, I hope the reader will indulge the possibility that with persistence and focus, a decentralized system could come to pass. Part of the genius of the progressive federalism movement is that it co-opts conservative values for liberal ends. Citizens in conservative jurisdictions value local control; devolution would grant control to them just the same as to liberal jurisdictions. Were immigration reformers to use their limited political capital to seek structural changes that cross ideological divides, the crime-based deportation regime might begin to lurch in a pro-immigrant direction.

I

CRIME-BASED DEPORTATION AND THE SELF-INTERESTED STATE

As long as there has been crime-based deportation, there has been a critique of crime-based deportation. Arguments and agitation against the practice coalesced as early as the 1930s, taking on the rough shape of contemporary criticisms.⁵⁹ While reformers were rebuffed in Congress, they succeeded in prodding the Immigration and Naturalization Service (INS) to craft clever interpretations of

⁵⁷ See *infra* Part II (describing one such individual story and its subsequent media coverage).

⁵⁸ There do not appear to be any obvious *legal* obstacles to having Congress devolve its power over this question directly to localities. Although localities are creatures of the states, Congress's especially strong power over immigration should allow it to give power to localities even against the wishes of state governments. See Jennifer Chacón, *Who Is Responsible for U.S. Immigration Policy*, 14 *INSIGHTS ON L. & SOC'Y* 20, 22–23 (2014) (describing how Congress is sometimes able to assert its will despite the wishes of local jurisdictions); see also *supra* note 15 (discussing how Congress's plenary authority over immigration may allow Congress to delegate discretion to a state's political subdivisions).

⁵⁹ MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 78–81 (2004) (describing critiques of deportation policy in the late 1920s and early 1930s).

existing laws to spare from deportation immigrants who had committed offenses from the petty to the serious, including “fraudulent naturalization, larceny, bigamy, rape . . . [and] manslaughter.”⁶⁰ The only crime that rendered European immigrants ineligible for the agency’s blessing was smuggling.⁶¹ Those guilty of illegal entry into the United States were also spared—if they were of European origin.⁶² As a result, immigration was mostly unconditional for European immigrants between the Depression and post-war years, despite what the statute books claimed. Between 1925 and 1965, some 200,000 illegal European immigrants were permitted to remain in the United States—despite serious criminal records—through these creative administrative mechanisms.⁶³

Things are different now. The national government has conscripted local law enforcement actors into the task of locating and deporting noncitizens when they make any contact with the criminal justice system.⁶⁴ A routine traffic stop is now an occasion to check an immigrant’s immigration status and determine whether he or she will be prioritized for deportation.⁶⁵ The national capacity to deport has increased exponentially and Trump has proposed further expansion;⁶⁶

⁶⁰ *Id.* at 86.

⁶¹ *Id.* Anarchists were also excluded from the agency’s grace. *Id.*

⁶² Mexicans and Caribbean migrants were denied access to these administrative innovations. *Id.* at 87.

⁶³ *Id.* at 89. For context, the foreign-born U.S. population numbered between 14.2 million in 1930 and 9.7 million in 1960. See *The “Second Great Wave” of Immigration: Growth of the Foreign-Born Population Since 1970*, U.S. CENSUS, <http://www.census.gov/library/visualizations/2014/demo/the-second-great-wave-of-immigration-growth-of-the-foreign-born-population-since-1970.html> (last visited Jan. 22, 2017).

⁶⁴ For a detailed discussion of this trend in the context of changing technology, see Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105 (2013).

⁶⁵ Indeed, the increased sophistication and interconnectedness of local and national police and immigration databases permit police officers to access immigration status information by simply running license plate numbers, avoiding any need to stop or arrest the suspected individual in order to obtain that information. *Id.* at 1125; see also Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 7–8 (2014) (detailing the exponential rise in the immigration system’s ability to surveil immigrants at the border and in the interior of the United States).

⁶⁶ One measure of this is to look at the exponential growth in deportations. Relying on public data, the *New York Times* reported that “[d]eportations under the Obama administration are on track to hit two million by the end of [2013]—nearly the same number of deportations from the United States between 1892 and 1997.” *Growth In Deportations*, N.Y. TIMES (Feb. 22, 2013), <http://www.nytimes.com/interactive/2013/02/22/us/politics/growth-in-deportations.html>. We can also measure deportation capacity by growth in enforcement expenditures. Here too the growth has been exponential. See *The Growth of the U.S. Deportation Machine*, AM. IMMIGR. COUNCIL (Mar. 1, 2014), <http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine> (“Since the federal government adopted a strategy of concentrated border enforcement known as ‘prevention through deterrence’ in the early 1990s, the annual budget of the Border Patrol has

the U.S.-Mexico border is effectively militarized.⁶⁷ All of this enforcement costs billions of dollars.⁶⁸ The old ethic of unconditional membership that drove the INS⁶⁹—an ethic extended even to fraudsters, rapists, and killers—has died out at the national level.⁷⁰ And the ethic

increased ten-fold, from \$363 million in FY 1993 to \$3.5 billion in FY 2013 . . .”). Donald Trump has pledged to further expand deportation capacity by hiring more border patrol officers. See Exec. Order No. 13,768, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017). Finally, advances in the technology of immigration enforcement, both in the typical “tech” sense and in terms of legal and strategic advances, have facilitated a dramatic increase in enforcement capacity. Kalhan, *supra* note 64, at 1109.

⁶⁷ See, e.g., Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 368–70 (2007).

⁶⁸ See *The Growth of the U.S. Deportation Machine*, *supra* note 66.

⁶⁹ The most striking thing about the history of the INS’s efforts during this period is the way that administrative and judicial actors departed so dramatically from the bureaucratic script to find creative ways to stay the hand of deportation for noncitizens who had committed serious crimes. This kind of action on behalf of noncitizens whose criminality stigmatized them with another layer of social exclusion beyond their alienage must have been driven by motives beyond the instrumental or practical. Martha Nussbaum argues that emotions—“good” and “bad”—are central to political life. For liberal societies to thrive, they must attend to the emotional content of public life, inculcating emotions of sympathy and love for public ideals and the projects at the heart of liberal democratic life. MARTHA C. NUSSBAUM, *POLITICAL EMOTIONS: WHY LOVE MATTERS FOR JUSTICE* 2 (2013). “All political principles . . . need emotional support,” she writes, and to ensure the stability of liberal political ideals, liberal societies “need to think about compassion for loss, anger at injustice, the limiting of envy and disgust in favor of inclusive sympathy.” *Id.* Something like “inclusive sympathy” appears to have played a role in the INS’s efforts to pull the levers of power and give life to unconditional membership. Yet the inclusive sympathy of this period had a dark side: it excluded Mexican and other Latino immigrants. See *supra* notes 60–62 and accompanying text. Indeed, the same set of bureaucratic actors went out of their way to treat immigrants of Hispanic descent differently. *Id.* Recent quantitative empirical research by Adam Cox and Thomas Miles confirms that this anti-Latino bias persists in the work of the national enforcement agency. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 89–90 (2013) (showing that the best predictor of the deployment of increased immigration enforcement resources to local communities by ICE was the level of the local Hispanic population even after controlling for foreign-born population and other predictors of immigration violations). This makes the achievement of sanctuary jurisdictions’ extension of inclusive sympathy to its population of *nonwhite* crime-based deportees all the more impressive, and worthy of preservation.

⁷⁰ There is voluminous evidence of the death of the unconditional ethic at the national level. For instance, congressional representatives on both sides of the aisle embrace crime-based deportation as a foundational policy, important enough to fight international efforts to thwart this policy. See Ron Nixon, *Nations Hinder U.S. Effort to Deport Immigrants Convicted of Crime*, N.Y. TIMES (July 1, 2016), <http://www.nytimes.com/2016/07/02/us/homeland-security-immigrants-criminal-conviction.html>. In response to Haiti’s refusal to accept a deported national convicted of murder, Richard Blumenthal, the Democratic senior senator from Connecticut, “said he planned to introduce legislation that would impose sanctions on countries that refuse to take back their nationals.” *Id.* Blumenthal urged that “[t]here is no reason we should have to go on bended knee to ask [receiving countries to accept their nationals]. [W]e shouldn’t have to keep someone in this country who is here illegally but also dangerous.” *Id.* Republican Senator Charles Grassley agreed

never applied to nonwhites, who now make up the bulk of the non-citizen population.⁷¹

Many scholars and activists are nonetheless intent on transforming crime-based deportation,⁷² which necessarily requires resurrecting and re-figuring the old ethic of unconditional immigrant membership. The practical obstacles to imposing this ethic nationwide are substantial,⁷³ but the challenge for reformers and critics runs deeper, all the way down to the foundational assumption of the modern democratic nation-state: that policy and law be made to reflect the self-interest of the citizenry. As Eric Posner bluntly states: “Politicians advance the interests of voters, and foreigners [including immigrants] do not vote. The normative basis of immigration law is thus maximization of the well-being of American[] [citizens].”⁷⁴ In this Part, I tease out the fundamental incompatibility of transforming crime-based deportation with workaday notions of national self-interest. To develop this argument, I survey contemporary critiques of crime-based deportation with a gimlet eye, pointing out the ways in which critiques of crime-based deportation have failed to adequately grapple with what crime-based deportation accomplishes for the nation.

and wrote a letter to the Secretary of Homeland Security urging him to press “recalcitrant countries.” *Id.* “‘Lives are being lost,’ Mr. Grassley wrote. ‘It can’t continue.’” *Id.*; see also, Chacón, *supra* note 3 (arguing that the United States’ regulation of immigration is centered around crime).

⁷¹ The program of immigrant forgiveness undertaken in the 1930s was restricted to immigrants from Europe. Immigrants from Mexico and the Caribbean were in various ways kept from accessing the privileges of forgiveness offered to future members of the white race. NGAI, *supra* note 59, at 86–89.

⁷² The intent to drastically curtail or abolish crime-based deportation is implicit in most critiques of the practice—the parade of condemnation for the status quo rules out tinkering at the margins—and made explicit in some articles that offer prescriptions for ameliorating the crime-based deportation regime. See, e.g., Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1245–46 (2013) (arguing that various other factors besides the commission of a crime should be used to determine a noncitizen’s right to remain in the country); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 648–49 (2012) (arguing that crime-based deportation results in overcriminalization and needs to be changed); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1359 (2010) (arguing that the criminal system and civil immigration enforcement system work together as one single bureaucracy); McLeod, *supra* note 6, at 173–78 (arguing that the framework that shapes immigration policy must be reoriented in order to undo the connection between the immigration and criminal systems); Stumpf, *supra* note 4, at 418 (arguing that the intersection between the criminal and immigration system creates a negative perception of immigrants).

⁷³ See *infra* note 183 (discussing the practical political barriers to imposing unconditional immigrant membership).

⁷⁴ Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 291 (2013).

The self-interested citizenry, considered nationally and in the aggregate, has rational reasons to condition membership on conformance to the criminal code and to shirk procedural protections where convenient.⁷⁵ That fundamental, realpolitik rationality—if not justice—poses an insurmountable barrier to the national transformation that critics desire.

A. *Scrutinizing Critiques of Crime-Based Deportation*

Crime-based deportation has met sustained criticism in the legal literature for at least a decade. In that time, an orthodox critique has developed that contains the following elements: (1) immigrants lower crime rates;⁷⁶ (2) crime-based deportation is not worth the cost;⁷⁷ (3) crime-based deportation is deficient in due process;⁷⁸ and (4) crime-based deportation is a disproportionate response to a noncitizen's

⁷⁵ See McLeod, *supra* note 6, at 164–68 (discussing how crime-based deportation is rational in the sense that it relieves the cognitive dissonance the citizenry feels over immigration and race).

⁷⁶ This claim is well established in the sociological literature. See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 251–60 (2012) (describing evidence that immigrants' lower criminal propensity diffuses to the native-born in neighborhoods of high immigrant concentration); Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, 1 CRIM. JUST. 2000, at 485, 486 (2000) (describing how immigrants lower crime rates); Rubén G. Rumbaut, *Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities* 2 (Aug. 2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877365 (describing how immigration is associated with lower crime and incarceration rates). Prominent immigration scholars repeat this fact frequently in an effort to counter the belief among citizens and their representatives that immigrants are criminogenic. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1879–80 (2007); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1032 (2010) (mentioning that an increase in immigrants decreased crime rates in a specific community); Pratheepan Gulasekaram, “*The People*” of the Second Amendment: *Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1565 (2010); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 501–02 (2007); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1349 (2011).

⁷⁷ See, e.g., McLeod, *supra* note 6, at 130–31; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1614–15 (2008).

⁷⁸ See generally Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013) (arguing that there are insufficient due process protections for immigrants charged with misdemeanors); Eagly, *supra* note 72, at 1304–19 (stating that immigrants in the criminal justice system do not have the same due process rights as do citizens); Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1465–66 (2011) (arguing that deportation proceedings do not require many of the hallmarks of due process protection); Stephen H. Legomsky, *Transporting Padilla to Deportation Proceedings: A Due Process Right to the Effective Assistance of Counsel*, 31 ST. LOUIS U. PUB. L. REV. 43 (2011) (arguing that deportation proceedings should be subject to more rigorous due process requirements than they currently are).

criminal act.⁷⁹ Scholars have built up and embellished these core criticisms of crime-based deportation, but have not adequately interrogated them through the lens of the national self-interest paradigm that dominates national immigration politics. The few who have skeptically examined these orthodoxies have normative commitments—“priors”—that are opposed to those of mainstream immigration scholars,⁸⁰ limiting the impact of their arguments.

This subsection aims to fill this gap in the literature. I share the priors of mainstream scholars⁸¹—I would be pleased if crime-based deportation were abolished or substantially curtailed—and so here I pull apart the crime-based deportation critique to underscore the depth of the transformative challenge rather than undermine arguments for reform or transformation. This close inspection shows that the orthodox critique of crime-based deportation is fragile because of two assumptions which the orthodox critique leaves unchallenged: (1) that citizens ought to be able to exclude aliens whom they do not wish to receive, and (2) that citizens matter more than aliens in all ways relevant to lawmaking and policymaking. If we take these assumptions seriously and apply them to the question of crime-based deportation, they comprehensively undermine the orthodox critique.

Exposing this fragility ought not to prompt despair, but rather should promote clear-eyed thinking about what it will take for crime-based deportation to be transformed. I argue that scholars should abandon their national focus and seek ways to shift power over crime-based deportation to localities, where arguments for unconditional membership will find a more receptive audience in some places where many immigrants live.

⁷⁹ See, e.g., Banks, *supra* note 72; Stumpf, *supra* note 11; Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012) (arguing that deportation decisions should be subject to proportionality review).

⁸⁰ See, e.g., Cox & Posner, *supra* note 17 (describing the costs and benefits of ex ante and ex post screening of immigrants and arguing that a de facto ex post screening system aligns with the United States' self-interest); Posner, *supra* note 74 (describing a specific approach to addressing questions concerning the institutional design of America's immigration system and using that approach to address current debates in immigration law); Schuck & Williams, *supra* note 15, at 458–63 (arguing for a federalist approach to immigration enforcement, but with national incentives to increase resources to localities so as to increase national deportation capacity). *But see* Fan, *supra* note 8, at 132–33 (arguing that the transformation of crime-based deportation is not feasible and that scholars and activists should settle for incremental reforms).

⁸¹ For discussions of my positions on these issues, see Morales, *Crimes of Migration*, *supra* note 13, Daniel I. Morales, “*Illegal*” Migration Is Speech, 92 IND. L.J. 735 (2017) [hereinafter Morales, “*Illegal*” Migration]; Morales, *Democratic Will*, *supra* note 20.

1. *Immigrants Lower Crime Rates*

Critics of crime-based deportation often argue that immigrants lower, rather than raise, crime rates. Studies show that immigrants in the aggregate reduce overall crime rates in the places where they settle.⁸² The reduction occurs because immigrants commit far fewer crimes than socioeconomic indicators would predict, i.e., less than similarly situated American-born whites, African-Americans, Latinos, and Asians.⁸³ The sociologist Robert Sampson, who has best established the statistical relationship between immigrants—especially Latino immigrants—and reduced crime, has dubbed the phenomenon, the “Latino paradox.”⁸⁴ Sampson theorizes that the culture Latinos bring with them inoculates them from the criminogenic features of the environments in which they settle.⁸⁵ Buttressing this cultural theory with behavioral psychology, Jennifer Gordon and Robin Lenhardt have argued that recent arrivals are more content with lives of American poverty than the native-born, since they compare themselves to peers in their countries of origin, who are much worse off,⁸⁶ perhaps contributing to lower rates of criminality.

However, there is another possible causal explanation for the link between immigrants and lower crime rates: Immigrants do not commit crimes because they fear—more than jail—the exile and shame of deportation.⁸⁷ Furthermore, immigrants’ aggregate effects are orthog-

⁸² See SAMPSON, *supra* note 76, at 252–54 (surveying and summarizing evidence that immigrants reduce crime rates in locations with high concentrations of immigrants); John M. MacDonald, John R. Hipp & Charlotte Gill, *The Effects of Immigrant Concentration on Changes in Neighborhood Crime Rates*, 29 J. QUANTITATIVE CRIMINOLOGY 191 (2013) (showing a positive relationship between immigrant concentrations and lower neighborhood crime rates); Robert J. Sampson, Jeffrey D. Morenoff & Stephen Raudenbush, *Social Anatomy of Racial and Ethnic Disparities in Violence*, 95 AM. J. PUB. HEALTH 224, 229 (2005) (showing that immigrants commit fewer crimes than do the native-born); see also RUBÉN G. RUMBAUT & WALTER A. EWING, *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN* 6 (2007), <https://www.americanimmigrationcouncil.org/research/myth-immigrant-criminality-and-paradox-assimilation> (showing that foreign born men aged eighteen to thirty-nine are incarcerated at a rate that is five times lower than that of native born men).

⁸³ SAMPSON, *supra* note 76, at 251–52.

⁸⁴ *Id.*

⁸⁵ *Id.* at 257.

⁸⁶ Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1220–22 (2008).

⁸⁷ That immigrants feel great shame after deportation, and are ostracized by receiving communities for their perceived criminality, has been documented in an ethnographic study of crime-based deportees returned to El Salvador. See M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 394–96 (2010) (showing how child migrants who are deported feel shame upon their

onal to the question crime-based deportation raises: Should we expend resources to lower the risk of aggregate immigrant crime *at the margin*? That the average immigrant commits less crime than the average citizen, controlling for socioeconomic status, does not in itself respond to that question. Nor does the correlative relationship between immigrants and lower crime rates rule out the value of crime-based immigration enforcement. It could be that such enforcement contributes to immigrants' lower rates of criminal commission both through deterrence and a reduction in the immigrant criminal population.⁸⁸

The "aggregate effects" critique of crime-based deportation is even more suspect when we consider national crime levels over the long run. Looking at the long run matters because immigration, whether "legal" or not, is an intergenerational commitment: Birth-right citizenship grants full membership to any child born on U.S. soil.⁸⁹ Citizens, of course, are not deportable.⁹⁰ While foreign-born immigrants have a dramatically lower propensity to commit crimes than do native-born socioeconomic peers, immigrants' children, and their children's children, acculturate to relatively high American levels

return to their countries of origin). A prominent theoretical literature posits that fear of shame can deter criminal behavior. See Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2189–94 (2003) (collecting theoretical accounts of why shaming punishments would deter criminal behavior). However, some studies show that increases in the intensity of immigration enforcement do not affect rates of immigrant crime. See Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937, 970–71 (2014) (finding that increased immigration enforcement did not decrease immigrant crime rates); Elina Treyger, Aaron Chalfin & Charles Loeffler, *Immigration Enforcement, Policing, and Crime: Evidence from the Secure Communities Program*, 13 CRIMINOLOGY & PUB. POL'Y 285, 310–11 (2014) (finding no significant change in community crime rates after the implementation of the Secure Communities program, which increased immigration enforcement). Though these studies provide evidence that immigrant crime rates are inelastic to changes in the probability of deportation, they cannot rule out the possibility that the threshold threat of deportation, to which all immigrants are subject, represses immigrant criminal propensity. They cannot rule this out because there is no adequate control group; there is no category of noncitizens immune to the threat of crime-based deportation.

⁸⁸ There is modest evidence of this in the quantitative empirical literature. See Treyger, Chalfin & Loeffler, *supra* note 87, at 291 (citing five studies showing modest decreases in crime rates based on changes in immigration enforcement levels).

⁸⁹ See *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898) (establishing birthright citizenship); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 165–80 (1996) (describing why the Fourteenth Amendment and *Wong Kim Ark* grant automatic citizenship to the American-born descendants of all immigrants, including the undocumented).

⁹⁰ See Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 363 (2012) ("Under both U.S. and international law, a U.S. citizen must be allowed into the United States, and citizens cannot be deported.").

of criminality.⁹¹ This acculturation to crime⁹² is a more acute problem today than in the past because low socioeconomic status correlates with crime,⁹³ and the children of immigrants—like all Americans—enjoy lower socioeconomic mobility than did previous generations.⁹⁴ Today it is less likely that the second and third-generation descendants of low-skill immigrants will escape the socioeconomic conditions that increase their criminal risk.⁹⁵ Moreover, children of immigrants with criminal convictions are at even higher risk of becoming criminals themselves.⁹⁶ Thus crime-based deportation may lower total U.S.

⁹¹ See SAMPSON, *supra* note 76, at 252 (stating that “first-generation immigrants . . . were 45 percent less likely to commit violence than third-generation Americans”); Sampson, Morenoff & Raudenbush, *supra* note 82, at 229 (“First-generation immigrants’ odds of violence are almost half those of third-generation immigrants . . . and second-generation immigrants’ odds are approximately three quarters those of third-generation immigrants.”). By the third generation, the protective effect of immigration status has largely worn off: Mexican-American rates of violent crime slightly exceed rates for whites. Sampson, Morenoff & Raudenbush, *supra* note 82, at 229. Looking at incarceration, rather than offense rates, tells a similar story. See RUMBAUT & EWING, *supra* note 82, at 6 (“[T]he incarceration rate of native-born men [aged eighteen to thirty-nine] . . . [3.5%] was 5 times higher than the incarceration rate of foreign-born men [0.7%]. . . . [N]ative-born Hispanic men were nearly 7 times more likely to be in prison than foreign-born Hispanic men . . .”).

⁹² See RUMBAUT & EWING, *supra* note 82, at 11 (“[A]ssimilation often entails incorporation into ‘minority’ status in the United States, particularly among poor immigrants from non-European countries. As a result, the children and grandchildren of many immigrants . . . become subject to economic and social forces that increase the likelihood of criminal behavior among other natives.”).

⁹³ In general, people with low socioeconomic status are both more likely to commit crimes and be victims of crimes. See Mike Males, *Age, Poverty, Homicide, and Gun Homicide: Is Young Age or Poverty Level the Key Issue?*, SAGE OPEN 9 (2015) (describing correlation between criminal behavior and low socioeconomic status); ERIKA HARRELL ET AL., HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION 2008-2012 (2014) (finding that people living below the federal poverty level were more than twice as likely to be victims of violent crimes).

⁹⁴ See Rubén G. Rumbaut, *Assimilation’s Bumpy Road*, in AMERICAN DEMOCRACY AND THE PURSUIT OF EQUALITY 184, 208 (Merlin Chowkwanyun & Randa Serhan eds., 2011) (“The finding that incarceration rates are much lower among immigrant men than the national norm, . . . but increase significantly among the second generation, suggests that the process of ‘Americanization’ can lead to greater risk of involvement with the criminal justice system and subsequent downward mobility”); see also THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 484 (Arthur Goldhammer trans., 2014) (2013) (“[I]ntergenerational reproduction [of social class] is lowest in the Nordic countries and highest in the United States (with a correlation coefficient two-thirds higher than in Sweden). France, Germany and Britain occupy a middle ground, less mobile than northern Europe but more mobile than the United States.”); ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS 34–45 (2015) (discussing significant declines in social mobility in the United States).

⁹⁵ See Rumbaut, *supra* note 94, at 210 (“Hispanic workers remain mired at the bottom of the workforce, disproportionately occupying most unskilled and semi-skilled jobs across the generations.”).

⁹⁶ A number of studies establish that the children of those with criminal convictions are at significantly higher risk of committing crimes as adults, controlling for other

criminality in the long run by reducing the future population of *citizens* with relatively high criminal propensity. It achieves this by lowering the number of immigrants with criminal convictions that give birth to citizen children. These arguments suggest that crime-based deportation will, at least modestly, reduce crime rates in the future.

2. *Crime-Based Deportation Is Not Worth the Cost*

Critics of crime-based deportation have argued that securing marginal crime-reduction may not be worth the cost.⁹⁷ Preventing a single commission of illegal entry into the United States costs around \$7500, a single deportation costs \$23,000,⁹⁸ and total annual immigration enforcement expenditures amount to \$18 billion—more than expenditures on all other federal law enforcement combined.⁹⁹ Sociologist Doug Massey has shown that the principal effect of the militarization of the U.S.-Mexico border has been to increase the price of crossing into the United States.¹⁰⁰ The increase in price has had little direct effect on demand to migrate, but instead has resulted in extending the length of time that the average undocumented nonci-

criminogenic variables. See, e.g., David P. Farrington et al., *The Concentration of Offenders in Families, and Family Criminality in the Prediction of Boys' Delinquency*, 24 J. ADOLESCENCE 579, 592–93 (2001) (“Arrested persons were highly concentrated in families If one relative had been arrested, there was a high likelihood that another relative had also been arrested. . . . [A]n arrested father was the best predictor of all three measures of the boy's delinquency.”); Joseph Murray & David P. Farrington, *Parental Imprisonment: Effects on Boys' Antisocial Behaviour and Delinquency Through the Life-Course*, 46 J. CHILD PSYCHOL. & PSYCHIATRY 1269, 1276 (2005) (finding parental imprisonment to be a significant risk factor of delinquent behavior in children); Lee N. Robins, Patricia A. West & Barbara L. Herjanic, *Arrests and Delinquency in Two Generations: A Study of Black Urban Families and Their Children*, 16 J. CHILD PSYCHOL. & PSYCHIATRY 125, 140 (1975) (“Parental arrest histories were powerful predictors of their children's delinquency.”).

⁹⁷ For an extensive critique of the costs of criminal-immigration enforcement, see McLeod, *supra* note 6, at 130–56. See also Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-entry Cases Are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719, 741–42 (2010) (estimating the costs of imprisoning noncitizens convicted of the crime of illegal entry at approximately 600 million dollars per year).

⁹⁸ *Cut Here: Reducing Spending on Immigration Enforcement Save More than \$2.6 Billion*, NAT'L IMMIGR. F. (Nov. 15, 2011), <https://immigrationforum.org/blog/cut-here-reducing-spending-on-immigration-enforcement-save-more-than-2-6-billion/>.

⁹⁹ DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 9 (2013), <http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

¹⁰⁰ See *Securing the Borders and America's Points of Entry: What Remains to Be Done?: Hearing Before the Subcomm. on Immigration, Refugees & Border Sec. of the S. Comm. on the Judiciary*, 111th Cong. 26 (2009) (statement of Douglas Massey, Professor of Sociology and Public Affairs, Princeton University) [hereinafter Massey Senate Hearing Testimony] (testifying that the main effect of increased border enforcement has been to increase the cost of border crossing and extend the stay of undocumented immigrants in the United States).

tizen stays in the United States.¹⁰¹ The extended stay is a function of the need to earn more wages in order to pay off the higher entry costs, as well as the increasing difficulty and cost of *exiting* the United States.¹⁰² Thanks to increased border enforcement, a successful “illegal” entry is a more permanent proposition than it used to be.

According to critics of crime-based deportation, deporting noncitizens for minor crimes also creates social costs by breaking up families when citizen children remain in the United States after a parent is deported.¹⁰³ To the extent the deported noncitizen was economically productive—and the vast majority are—GDP decreases at the margin.¹⁰⁴

Critics cast the benefits as paltry by comparison, securing at best marginally higher wages for native-born workers in the select industries where large numbers of immigrants compete directly with natives.¹⁰⁵ In the case of immigrants who have committed crimes other than “illegal” entry, we save incarceration costs and the social costs of criminal harm in proportion to the likelihood of recidivist risk in a particular case, and the type of social harm that the deported noncitizen might cause. Since the vast majority of crime-based deportees commit crimes which cause minimal harms to persons or property, critics of crime-based deportation claim these savings are modest.¹⁰⁶

The benefits of crime-based deportation may be larger than the literature generally acknowledges, however. Eric Posner and Adam Cox have theorized that crime-based deportation functions as an informal “illegal immigration system,”¹⁰⁷ which tolerates a large degree of migration outside legal channels in order to lower immigrant screening costs for low-skill workers, since it is difficult to pre-

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1189–1207 (describing the myriad of problems that mixed-status families face when a parent or other primary caregiver is deported).

¹⁰⁴ This is true if we assume the social costs of the minor crime do not outweigh the marginal value of the immigrant’s contribution to economic productivity. See LANT PRITCHETT, *LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON INTERNATIONAL LABOR MOBILITY* 31–32 (2006) (explaining that increased immigration increases GDP primarily by increasing the rate of capital utilization in a given economy).

¹⁰⁵ See Treyger, *supra* note 15, at 123–27 (analyzing the literature on the wage effects of immigrant labor and concluding that they vary from positive to negative depending on jurisdiction); see also Posner, *supra* note 74, at 292 (describing the positive and negative effects of immigration on an area’s economy).

¹⁰⁶ See McLeod, *supra* note 6, at 135–36 (arguing that the staggering costs of crime-based deportation swamp whatever minimal benefits accrue from deporting noncitizens with criminal convictions).

¹⁰⁷ Cox & Posner, *supra* note 17, at 844.

dict *ex ante* whether a given immigrant will be productive and assimilable.¹⁰⁸ Crime-based deportation does this work on the back end, signaling that a low wage worker was a bad bet.¹⁰⁹ Another salient benefit emerges out of the insight about intergenerational criminal propensity discussed above.¹¹⁰ In a period of sclerotic social mobility, it might be more important than it was in the mid-twentieth century to deselect immigrants who show even a low level of criminal propensity. No matter the law-abidingness of founding immigrants, second and third generation descendants acculturate to the criminal propensity of their socioeconomic class.¹¹¹ In this scenario, deporting immigrants who do not prove to be inoculated from criminality in the founding generation may have some long-term value if the parents' disordered behavior is transmitted to their child through social mechanisms at some non-negligible rate, as research shows it is.¹¹²

Other benefits are not immigration-related. The \$23,000 cost per deportation is effectively economic stimulus, and given the labor intensity of immigration enforcement, it also acts as a jobs program targeted at citizens.¹¹³ In an era of declining working and middle class prospects, the colossal ramp-up of immigration enforcement has provided at least 20,000 additional middle class jobs for a citizenry sorely in need of such work.¹¹⁴ Immigration enforcement jobs are staffed, overwhelmingly, by citizens.¹¹⁵

Immigration enforcement also may offer legitimacy benefits for the immigration system as a whole: it buys support for “legal” immigration. If we have deported the “bad” criminal immigrants, it means we are left with the “good” immigrants. That such categories are actually quite fuzzy constructions of law and politics—rather than precise assessments of a particular noncitizen's human potential—does not render the categories any less important for telegraphing the legiti-

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 844–52. Allegra McLeod has thoroughly critiqued this argument on the grounds that the monetary costs to deport, as well as the human costs, vastly outweigh the gains. McLeod, *supra* note 6, at 130–56.

¹¹⁰ See *supra* Section I.A.1 (discussing how criminal propensity increases intergenerationally the longer an immigrant family remains in the United States).

¹¹¹ *Id.*

¹¹² See *supra* note 96 and accompanying text.

¹¹³ Bernard E. Harcourt, *Political Disobedience*, in *OCCUPY: THREE INQUIRIES IN DISOBEDIENCE* 45, 80–81 (2013) (arguing that government spending on “domestic security,” rather than “investing in schools and education, job training, or reentry programs,” creates jobs that “substitute for a welfare state”).

¹¹⁴ Overall Customs and Border Patrol (CBP) staffing increased 50% from 41,001 to 61,354 between 2004 and 2011. MEISSNER ET AL., *supra* note 99, at 18.

¹¹⁵ See *Get a Homeland Security Job*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/how-do-i/get-homeland-security-job> (last visited Oct. 18, 2016) (stating that most DHS jobs require U.S. citizenship).

macy of immigration law to the citizenry. David Martin has long argued that this kind of enforcement is an essential part of building the goodwill required to increase the visa supply.¹¹⁶

All of these costs and benefits are slippery.¹¹⁷ But lining up costs and benefits presents problems beyond administrability: the problem is also epistemic. There is no stable ground beyond the political on which to say a particular expenditure on crime-based deportation enforcement is excessive. If we accept that citizens ought to control immigration decisions unilaterally—without input from the noncitizens subject to immigration laws and enforcement—then we accept that their preferences matter a great deal.¹¹⁸ We can say that spending \$23,000 to deport a person who commits an illegal entry, and whose work, on average, is a net plus for GDP, is absurd (and that is my personal view), but the fact that our democracy enforces it at that cost

¹¹⁶ See, e.g., David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 551 (2007) (“[T]he only politically durable foundation for generous legal immigration policy in the future is the assurance that immigration is under control. Without reliable enforcement, the political field is open to those who blow the negative effects of immigration out of all proportion”); David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 417–18 (2015) (“The assurance of a reasonably functional enforcement regime would provide a vital barrier against shifting political winds and incipient anti-foreigner demagoguery, thus helping the United States sustain wise immigration policy.”).

¹¹⁷ For example, as the futility of President Obama’s effort to ramp up immigration enforcement in hopes of securing congressional action on immigration reform became clear, many scholars have taken issue with the idea that securing legal status for the undocumented is worth the heavy toll of deportations. Indeed, two sociologists have shown that increases in enforcement *increase* the demand for immigration enforcement, rather than sate it. Douglas S. Massey & Karen A. Pren, *Unintended Consequences of US Immigration Policy: Explaining the Post-1965 Surge from Latin America*, 38 POPULATION & DEV. REV. 1, 9 (2012) (“[M]ore restrictive legislation and more stringent enforcement operations generate more apprehensions, which politicians and bureaucrats can then use to inflame public opinion, which leads to more conservatism and voter demands for even stricter laws and more enforcement operations”). The most important point of slippage is whether to count harms or gains to noncitizens as harms or gains at all. The self-interested state certainly would not. See Posner, *supra* note 74, at 291 (asserting that U.S. immigration law is concerned with the “maximization of the well-being of Americans” without consideration for the interests of noncitizens). But in practice, the political system does manage to take some account of some of these harms. See Morales, *“Illegal” Migration*, *supra* note 81, at 41–54 (theorizing that undocumented migration forces the self-interested state to take some account of noncitizens’ interests in the formation of immigration law and policy).

¹¹⁸ See Treyger, *supra* note 15, at 135 (pointing out that the questions posed by deportation “do not lend themselves to technocratic accounting of quantifiable costs and benefits”); cf. Morales, *Crimes of Migration*, *supra* note 81, at 1304 (noting that it is “difficult to definitively say that any quantity expense for any marginal benefit is too much to defend our ‘sovereignty’”).

level is itself evidence that the citizenry places that dollar value on enforcing crime-based deportation law.

Now, we could make this claim about law enforcement costs in general or any other question of social value, yet many scholars would reject the idea that democratically authorized expenditures are equivalent to their social value just because of their democratic imprimatur. For example, one might argue that criminal justice expenditures are not welfare-enhancing in an amount greater than their dollar value in large part because the political process on these issues functions extraordinarily poorly. Criminal law scholars argue that the political process does not adequately include the voices of those disproportionately affected by poor criminal laws and criminal enforcement practices, particularly African-Americans and other minorities.¹¹⁹

But this political process¹²⁰ argument does not apply in the immigration context. In fact, quite the opposite is true: We think it *legitimate* to exclude the voices of immigrants in the formation of the law of crime-based deportation. It is for the citizenry to decide what level and kind of enforcement is appropriate.¹²¹ This legitimate difference in political status and standing lends far more credence to the idea that significant expenditures on immigration enforcement generate social value since, on this theory of whose interests count in a democracy, the harm to immigrants does not and ought not enter into the calculus at all.¹²²

¹¹⁹ See e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 132 (2001) (asserting that the U.S. government declared a war against drugs and “persist[s] in pursuing it, despite every indication of its failure” because “the groups most adversely affected lack political power”); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 199 (2003) (arguing that American criminal justice is particularly harsh in comparison to European peers because it is controlled to a much greater degree by democratic politics); Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 *IND. L.J.* 571, 594 (2005) (“Criminal defendants are not popular; to the contrary, they are the quintessential discrete and insular minority identified by political process theorists.”).

¹²⁰ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (theorizing that the Supreme Court is justified in overturning democratic legislation when those laws affect minorities that are underrepresented in the political process); Gershowitz, *supra* note 119, at 598–99 (applying Ely’s political process theory of judicial review to the indigent defense context).

¹²¹ See Rodríguez, *supra* note 32, at 1794 (arguing that a legitimate regime “must respond to public views concerning acceptable levels of immigration”).

¹²² This is not a view with which I agree, but it is the consensus view among policymakers and politicians. See, e.g., Posner, *supra* note 74, at 290–91 (asserting that the view that immigration law should take into account the interests of noncitizens “has virtually no support in American public policy”). Even the harm to citizen-children in having their noncitizen parents deported is not as obviously relevant to the self-interested state as progressive scholars claim. See Thronson, *supra* note 103, at 1179–86 (arguing that

3. *Deportation Is Deficient in Due Process and Lacks Constitutional Constraints*

Lack of due process is another mainstay of the crime-based deportation critique. Because immigration law is civil law, there is no right to counsel, and so most immigrants represent themselves in deportation proceedings.¹²³ Immigration judges are overloaded and understaffed, and thus can devote few resources to each individual case.¹²⁴ Congress has dramatically curtailed review of immigration court decisions, and where review remains available at all, has tightened the standards.¹²⁵ Many immigrants are imprisoned without a

“[p]rotecting children and their interests is not a priority of immigration law” and describing “other factors plainly . . . at work that advance national interests without regard to the individual families involved”). Birthright citizenship does not have a clear democratic imprimatur—rather it is an exception to the norm of Congress’s plenary authority over immigration, naturalization, and citizenship. The rule is a product of slavery, the Civil War, and the Supreme Court’s interpretation—not normal democratic politics. See sources cited *supra* note 89. Other nation-states have far more stringent criteria they apply to determine the citizenship status of immigrant children, in large measure because their rules are more responsive to the citizenry’s demands. For example, Germany only allows for citizenship at birth for children of foreigners who have lived in Germany for a certain period of time. See Staatsangehörigkeitsgesetz [StAG] [Nationality Act], July 22, 1913, BGBl I at 1714, § 4, no. 3, last amended by Gesetzes [G], Oct. 11, 2016, BGBl I at 2218 (Ger.), translation at http://www.gesetze-im-internet.de/englisch_rustag/englisch_rustag.pdf. As a result, many U.S. citizens who would say that crime-based deportation has value for them would also say that noncitizen children are not entitled to birthright citizenship, even if their parents are present with express U.S. permission. This framing reads harm to *citizen* children right out of the deportation cost-benefit calculus, on the logic that birthright citizenship is a form of unjust enrichment.

¹²³ See, e.g., Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2285 (2013) (“[I]n immigration proceedings the majority of the poor procede [sic] pro se.”); Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013) (“Roughly half of the noncitizens in [removal] proceedings from fiscal year 2007 to 2011 lacked legal representation.”); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 76–78 (2012) (“Put simply, most detainees are unable to secure adequate legal assistance.”).

¹²⁴ See Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1515–17 (2010) (highlighting “the need for speed in decisionmaking despite the gravity of the cases before immigration courts”); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 7 (2014) (noting the “overwhelming caseloads in many immigration courts”); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1130–33 (2011) (showing that federal courts of appeals were inundated with immigration cases after 9/11 and ruled against immigrants at significantly higher rates than courts unaffected by the surge in appeals from immigration courts); Legomsky, *supra* note 32, at 1651–57 (describing how “underresourcing has contributed . . . to less judge time per case”).

¹²⁵ See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 360–64 (2010) (discussing how the steady decline in avenues for relief from crime-based deportation has made crime-based deportation increasingly automatic); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704–05 (1997) (noting that 1996 legislation led to “a severe limitation of judicial review” of

bond hearing as they await deportation.¹²⁶ Juliet Stumpf has argued that the pre-deportation “process,” which includes imprisonment, dehumanized treatment, and lack of legal representation, constitutes a kind of punishment for violating immigration law.¹²⁷ It is a punishment *in addition* to deportation, a practice that despite its lineage as one of the oldest forms of punishment, is not regarded as punishment for legal purposes.¹²⁸

Of all the critiques of crime-based deportation, due process critiques have the strongest legal footing, since due process is constitutionally guaranteed to persons—not citizens.¹²⁹ This has grounded the idea that noncitizens deserve the full panoply of procedural protections in the deportation context, and thus due process dominates the literature’s wish list for crime-based deportation reform.¹³⁰

immigration cases); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 486–87 (2006) (describing how the REAL ID Act, passed in 2005, eliminated certain forms of jurisdiction for immigration review).

¹²⁶ See Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 390–402 (2014) (arguing that due process at a minimum requires that immigrants receive a bond hearing if they are detained for six months); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1506 & n.363 (2015) (noting that the federal government “continues to take the position that it can detain any migrant indefinitely before the migrant has been ordered removed, though a growing number of courts have disagreed”). The Supreme Court is currently considering the permissibility of this practice in a case filed by the American Civil Liberties Union (ACLU). As of this writing, the Supreme Court has not yet issued a final decision, but has ordered supplemental briefing on the question of whether the Constitution requires that people subject to mandatory detention before removal have bond hearings every six months. Supplemental Order, *Jennings v. Rodriguez*, No. 15-1204 (U.S. Dec. 15, 2016).

¹²⁷ Juliet P. Stumpf, *The Process Is the Punishment, in THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION* 58 (Katja Franko Aas & Mary Bosworth eds., 2013).

¹²⁸ See *Padilla*, 559 U.S. at 365 (recognizing that “deportation . . . is not, in a strict sense, a criminal sanction”); cf. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (noting that detention in removal proceedings is not “imprisonment in a legal sense”).

¹²⁹ U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any *person* of life, liberty, or property, without due process of law”) (emphasis added); see also Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1293 (2002) (“[I]n light of our constitutional tradition’s commitment to rights for persons, alien citizenship cannot be described as morally unjust”); Louis Henkin, “*Selective Incorporation*” in the *Fourteenth Amendment*, 73 YALE L.J. 74, 78 n.16 (1963) (“[T]he provisions of the Bill of Rights are not rights of citizens only but are enjoyed by non-citizens as well.”).

¹³⁰ See, e.g., Chacón, *Unsecured Borders*, *supra* note 76, at 1868–69 (describing due process protections for noncitizens as “minimal”); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 86 (2007) (lamenting “[t]he failure to provide basic procedural due process” for asylum seekers); Johnson, *supra* note 123, at 2404 (asserting that “due process requires that lawful permanent residents be provided counsel in removal proceedings”); E. Lea Johnston, *An Administrative “Death Sentence”*

In theory, this procedural foundation has the potential to yield substantive benefits, since procedure can translate to substance, as procedure scholars have long emphasized.¹³¹ But the particular relationship between procedure and substance turns on how broad the scope of the substantive rights at issue are. If the substantive law is broad or generous, then procedural access to such claims matters a great deal, but if the substantive law is meager, then access matters less.¹³² Immigration law is thin gruel.¹³³ Deportation is relatively automatic since there are few ways to escape it once an immigrant is in the system.¹³⁴ Additional procedural protections could buy a noncitizen time as the case winds its way through the courts, but it is unlikely ultimately to save the noncitizen from deportation.¹³⁵ Expending

for *Asylum Seekers: Deprivation of Due Process Under 8 U.S.C. § 1158(d)(6)'s Frivolousness Standard*, 82 WASH. L. REV. 831, 857–58 (2007) (advocating that due process apply in the context of frivolousness determinations that would make noncitizens permanently ineligible for immigration benefits); Kanstroom, *supra* note 78, at 1472–78 (arguing for a right to counsel in deportation proceedings); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998) (arguing that due process prohibits the retroactive application of new deportation laws); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1004 (1993) (arguing that due process and equal protection concerns should play a role in plenary power cases); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 714 (2011) (recommending criminal due process standards as the constitutional baseline for deportation proceedings to ensure that U.S. citizens are not wrongfully detained and deported).

¹³¹ See, e.g., William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964–65 (1989) (reviewing ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* (1988)) (discussing the authors' focus on procedural norms as a way to occlude the substantive injustice of legal process); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 818–22 (2010) (describing the substantive capacity of procedure).

¹³² Irrespective of substance there is inherent value in procedure. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61–92 (1988) (examining the role of procedure in promoting perceptions of fairness and satisfaction with the legal system); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 103–04 (1988) (citing studies which demonstrate that “citizen assessments of the justice of the procedures used by legal authorities to make decisions influence reactions to those decisions”).

¹³³ See Banks, *supra* note 72, at 1263–64 (explaining that over time Congress has increased the grounds for deportation under substantive immigration law); cf. Motomura, *The Discretion That Matters*, *supra* note 10 (arguing that because of the curtailment of avenues to relief for crime-based deportation, arresting officers have “the discretion that matters” for selecting which noncitizens will be deported from the United States).

¹³⁴ See Motomura, *The Discretion That Matters*, *supra* note 10, at 1851 (asserting that once immigrants are placed in “the immigration removal system, their removal would seem highly probable because they are unlikely to benefit from the favorable exercise of discretion”).

¹³⁵ See generally Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011) (describing how the additional procedural protections afforded to

scarce political capital on process reform may not be worth it. Indeed, the achievement of perfect process without substantive reform—or worse, at the cost of pro-noncitizen substantive law—would simply legitimize the violence of the crime-based deportation regime.

Even if process reform did not entail these risks, the tradeoff between process and efficiency is a barrier to achieving due process reform in Congress. While deportation capacity increased dramatically in recent years, to over 400,000 deportations per year,¹³⁶ that number still represents a small fraction of the deportable population of at least eleven million noncitizens.¹³⁷ Better process increases the cost to deport and, assuming static budget allocations, lowers deportation capacity.

One answer to this line of argument is the constitutional answer: Whatever decreased efficiency procedural protections create is just a cost of doing business in our constitutional order. But the Supreme Court is just as partial to citizens as Congress is.¹³⁸ Even if we set aside the possibility that the Court could reverse itself and anchor rights in the Privileges and Immunities Clause, as some scholars have suggested,¹³⁹ what is owed to the persons referred to in the Fourteenth Amendment is intimately tied to their citizenship status: Citizens are entitled to more protection than noncitizens from serious harm inflicted by the state and state actors.¹⁴⁰ The law and practice of immi-

immigrants with criminal convictions in *Padilla* are of limited consequence in terms of their ability to reduce the likelihood of deportation).

¹³⁶ See Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RESEARCH CTR. (Oct. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/> (finding that a record 438,421 unauthorized immigrants were removed from the United States in 2013). The latest statistics from 2015 show a decrease to 333,341 deportations. U.S. DEP'T OF HOMELAND SEC., 2015 YEARBOOK OF IMMIGRATION STATISTICS 103 (2016), <https://www.dhs.gov/sites/default/files/publications/DHS%202014%20Yearbook.pdf>.

¹³⁷ See Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (Nov. 3, 2016), <http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/> (stating that the population of undocumented migrants has stabilized at over eleven million people); cf. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 22–26 (2014) (describing different types of unlawful immigration status and concluding that immigration law by design renders vast numbers of immigrants eligible for deportation).

¹³⁸ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (affirming ability of Congress to “make rules [regarding aliens] that would be unacceptable if applied to citizens”).

¹³⁹ See, e.g., Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1149–51 (2000).

¹⁴⁰ I mean this statement as another way to frame the well-documented legal exceptionality of immigration law. See generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. REV. 583 (2017) (describing how immigration doctrines deviate from mainstream constitutional norms); see also

gration enforcement express this quite clearly.¹⁴¹ The notion that alienage matters for procedural desert may explain why the Supreme Court has been so reluctant to call deportation punishment,¹⁴² which it surely is. Doing that, of course, would trigger a cascade of costly procedural mandates from the Court that would set it in conflict with Congress, which has spent the last few decades dissolving such protections.¹⁴³ Indeed, *United States v. Padilla*¹⁴⁴ is symptomatic of these conflicts and contradictions. It is a procedural expansion—requiring that noncitizens be warned that pleading guilty could lead to deportation consequences—that the Court found necessary because Congress, by curtailing dramatically the number of cases eligible for procedures capable of granting deportation relief, had made crime-based deportation virtually automatic in many instances.¹⁴⁵

But *Padilla*'s mandate is a meager substitute for what was lost. Rather than a chance actually to avoid deportation, noncitizens are now entitled to know in advance of their criminal plea that they will almost certainly be deported. The notice is not nothing.¹⁴⁶ For example, some jurisdictions will occasionally bargain down charges to protect a noncitizen from being deported,¹⁴⁷ but that choice entails criminal justice costs that most prosecutors and district attorney's offices are not willing routinely to pay.¹⁴⁸ *Padilla*'s procedural gain was the product of a substantive loss, and whatever substantive gains can be wrung from the new procedural requirement do not make up this ground.

Scaperlanda, *supra* note 130, at 972–1002 (describing how the immigration power is explained by sovereignty theory rather than any constitutional principle).

¹⁴¹ For example, racial profiling is legal in the immigration context, even though it is illegal where citizens' rights are implicated. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3–7 (1998) (discussing how the Supreme Court permits race discrimination in selecting immigrants for admission and enforcing immigration law).

¹⁴² See *supra* note 128 and accompanying text.

¹⁴³ See *supra* note 125 and accompanying text; see also Banks, *supra* note 72, at 1275–78 (describing now-defunct discretionary procedures that once provided individualized relief from deportations).

¹⁴⁴ 559 U.S. 356 (2010).

¹⁴⁵ See *supra* note 125 and accompanying text.

¹⁴⁶ But see Brown, *supra* note 135, at 1395–96 (arguing that *Padilla* will not significantly aid immigrants wishing to avoid deportations for criminal convictions given the content of the relevant substantive laws, limited procedural possibilities for avoiding deportation, and the inadequacy of indigent defense).

¹⁴⁷ See, e.g., Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1163–65 (2013) (showing how Los Angeles prosecutors will reduce charges to help noncitizens avoid deportation).

¹⁴⁸ See *id.* at 1164 (“When the crime is more significant or the circumstances less compelling, a plea deviation is unlikely.”).

As for the Supreme Court's role in policing substantive immigration law (through substantive due process or other means): The Court is not and has never been inclined to place hard constitutional barriers on substantive immigration law.¹⁴⁹ Hiroshi Motomura has documented instances where the Court uses its powers of statutory construction to express "phantom" constitutional norms that sometimes limit substance.¹⁵⁰ But norms that are not expressly named as constitutional mandates, that exist as "phantoms," are less powerful legislative and executive constraints than those that the Court names and claims explicitly.

Furthermore, whatever procedural or substantive gains noncitizens make in the courts are easily undermined in the political process since noncitizens are politically disabled by their formal disenfranchisement.¹⁵¹ Whatever subtextual, judicially-imposed constraints exist are hopelessly inadequate to make up for the deficit caused by noncitizens' exclusion from the formal political process. In this respect, one might argue that noncitizens are the most "discrete and insular minority"¹⁵² of all. Thus, erecting effective constitutional barriers to anti-immigrant legislation would require the Court to do more than simply interpret immigration law in a pro-immigrant direction. Rather, the Court would need to be significantly *more* aggressive in protecting noncitizen rights to procedure and substance than it would have to be to protect the rights of any other disfavored minority group, since noncitizens entirely lack access to the ballot box. The Court has shown no inclination to play this transformative role. "Phantom" norms take the edge off, but they cannot transform crime-based deportation over the long run.

¹⁴⁹ See *supra* note 141 and accompanying text.

¹⁵⁰ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 549 (1990) (describing how courts, and the Supreme Court in particular, have relied on phantom constitutional norms in immigration cases to undermine the plenary power doctrine).

¹⁵¹ Despite their disenfranchisement, noncitizens do enjoy limited proxy representation through family members and recently naturalized citizens. Furthermore, the Census currently counts noncitizens in the population statistics which are used to distribute seats in the House of Representatives. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (finding that such "total-population apportionment promotes equitable and effective representation" because "[n]onvoters have an important stake in many policy debates"). Whether this latter practice will survive at the state and local level is up in the air, now that conservative interest groups have set their sight on advocating for the apportionment of electoral districts based solely on the number of eligible voters, rather than total population. See *id.* at 1133 (declining to "resolve whether . . . States may draw districts to equalize voter-eligible population rather than total population").

¹⁵² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that legislation affecting the interests of "discrete and insular minorities" may require more exacting judicial review); cf. *supra* note 119 and accompanying text.

Due process protections are vital, and they produce substantive benefits.¹⁵³ But immigration law is dynamic, and the disenfranchisement of noncitizens means that Congress could easily erode any procedural protections noncitizens may win by altering the substance of immigration law—and it has often seen fit to do so.¹⁵⁴ To achieve a transformation of crime-based deportation through the Due Process Clause would require the Supreme Court to take up the mantle of noncitizens and act as a kind of surrogate political representative for them. The Court has not played this role in a sustained way for any discrete and insular group of citizens;¹⁵⁵ it will not do so for “aliens.”¹⁵⁶

4. *Crime-Based Deportation Is a Disproportionate Response*

Critics of crime-based deportation have said in various ways that it is a disproportionate response to most crimes. Jumping a subway turnstile, for example, should not lead to a noncitizen’s near-automatic exile from the United States;¹⁵⁷ it is a penalty far too great for such a minor criminal infraction. Deportation, however, is not just a punishment. It is the mechanism through which we deselect individuals for membership in our political community. And, on that score, it is not as clear how proportionality fits into the analysis. There is not a *proportional* way to deselect immigrants; there is only deportation.¹⁵⁸ Crime-based deportation, then, will necessarily encompass a wide range of disfavored behaviors that all trigger an identical penalty.

¹⁵³ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 48–54 (2015) (showing that represented immigrants obtain relief at dramatically higher rates than the vast majority of immigrants proceeding pro se in immigration court).

¹⁵⁴ See *supra* note 125 and accompanying text.

¹⁵⁵ See Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1145, 1149 & n.95 (2012) (reviewing GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010)) (noting that the Supreme Court has continuously failed to protect racial minorities from democratic harms).

¹⁵⁶ Or, if Congress leads the way, reformers must confront head on the substantive tradeoffs that procedural improvement would likely entail.

¹⁵⁷ See *supra* note 9 and accompanying text.

¹⁵⁸ See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1685 (2009) (noting that “proportionality is conspicuously absent from the legal framework for immigration sanctions” because deportation is “the ubiquitous penalty for any immigration violation”); Treyger, *supra* note 15, at 122 (“Unlike criminal law, immigration law enforcement cannot shape violators’ incentives by calibrating the magnitude of the sanction to the severity of the violation.”). *But see* Banks, *supra* note 72, at 1267–72 (arguing that legislative debates dating back to the 1917 Immigration Act about crime-based deportation show that setting a high threshold for the seriousness of the crime was an effort to make crime-based deportation proportional).

We can argue, of course, about what crimes should fall above or below the floor for deportation, but whether we set the floor at turnstile-jumping or pickpocketing, once the floor is set, all noncitizens will be deselected in the same way: with deportation. And given the surfeit of people who wish to immigrate to the United States,¹⁵⁹ why should the self-interested state refrain from deselection of individuals for membership at the first sign of disordered behavior? After all, it can probably import immigrants with similar characteristics and a lower propensity to commit infractions.¹⁶⁰

For one, the counter to this argument goes, a single instance of disordered behavior does not reliably indicate an individual's full social value.¹⁶¹ The turnstile-jumper might also be a senior at New York University studying biochemistry. Deporting him without considering his broader value to the United States is bad policy because it throws the baby out with the bathwater. Yet, consider instead, the turnstile-jumper who was a construction worker, just as hardworking as the biochemistry student, but toiling in a lower socioeconomic stratum. Does the national self-interest calculus change?

Eric Posner and Adam Cox have suggested that it likely will change because the market for biochemistry students is internationally competitive and the market for construction workers is not.¹⁶² Refraining from deporting more educated immigrants makes sense in a competitive environment because immigrants must make "country-specific investments," like learning American norms.¹⁶³ Immigrants with options are less likely to make those investments in the United

¹⁵⁹ See Jon Clifton, *150 Million Adults Worldwide Would Migrate to the U.S.*, GALLUP (Apr. 20, 2012), <http://www.gallup.com/poll/153992/150-million-adults-worldwide-migrate.aspx> (reporting results of a poll showing that approximately 150 million adults would immigrate to the United States if permitted to do so).

¹⁶⁰ However, it is difficult to obtain information regarding criminal propensity *ex ante* for new migrants. See Cox & Posner, *supra* note 17, at 824–27 (justifying *ex post* deportation in part based on the difficulty of assessing *ex ante* which immigrants will be law-abiding). Still, what matters for this example is the comparison in criminal risk between the deportable noncitizen and the potential "replacement" immigrant. In that calculation the new immigrant wins since we know the old immigrant was an outlier—unlike most immigrants, he committed a crime—and the new immigrant poses the average amount of criminal risk.

¹⁶¹ See Stumpf, *supra* note 11, at 1734–38 (critiquing crime-based deportation for defining an immigrant's life by a single moment in time: the moment of the criminal infraction). This is the logic behind restoring individualized adjudication of crime-based deportation decisions. See Banks, *supra* note 72, at 1296–98 (decrying the lack of discretion and proportionality in the much less generous cancellation of removal procedure that replaced section 212(c) relief).

¹⁶² See Cox & Posner, *supra* note 17, at 834 (distinguishing between the procedures and protections that should govern admission of noncitizens of different skill levels).

¹⁶³ *Id.*

States if residency is so easily defeasible.¹⁶⁴ Of course, working class immigrants must make similar investments, but their less competitive market position means that the self-interested state need not accommodate them to the same extent.

The point holds even without global competition for skilled immigrants. The expected future productivity of the biochemistry student is much higher than the construction worker's; whatever depreciation in social value is indicated by the turnstile-jumping pales in comparison to the biochemistry student's future productivity. The case is closer for the construction worker because his economic value is not as great, so the discount applied for turnstile-jumping looms larger. The call is even closer if we consider the question of value intergenerationally. Since, as mentioned earlier,¹⁶⁵ intergenerational mobility is low and the children of immigrants begin to assimilate to higher native-born American levels of criminality,¹⁶⁶ we can expect that the construction worker's children are at a significantly higher risk of committing crime than the children of the biochemistry major, because their respective children are likely to occupy different rungs on the socioeconomic ladder. In this way, accounting for deportable immigrants' full social value takes critics of crime-based deportation into anti-humanistic terrain that conflicts with the dignity-based unconditional membership norms motivating their critique.

Against this purely consequentialist, nationalist logic, scholars make an effort to tie the interests of noncitizens to the interests of the citizenry by, for example, raising the difficulties faced by families with a mix of immigration statuses.¹⁶⁷ These efforts have at least two little-acknowledged flaws: They tend to undervalue what long-term immigrants gain for their time in the United States, despite their deportation, and relatedly, do not take adequate account of the way that protecting long-term residents from the harm of deportation can be unfair to more recent arrivals.

For example, consider two immigrants who have committed the crime of illegal entry into the United States. One noncitizen com-

¹⁶⁴ See *id.* (detailing the residency strategy of a highly skilled migrant in a sample market competition between Japan and the United States).

¹⁶⁵ See *supra* notes 91–96 and accompanying text.

¹⁶⁶ See *supra* notes 91–96 and accompanying text.

¹⁶⁷ See, e.g., Banks, *supra* note 72, at 1245–46, 1293–96 (arguing that the right to remain in the United States with a criminal conviction ought to be allocated based on the depth of a noncitizens' ties, including length of residency, to the United States); see also Thronson, *supra* note 103, at 1165–67 (discussing the hardships faced by families that contain a mix of immigration statuses).

mitted the crime ten years ago¹⁶⁸ and the other two years ago. Mainstream critiques would suggest that deportation is a disproportionate response in the case of the ten-year resident, but arguably appropriate in the case of the two-year resident, since the longer-term resident has set down roots.¹⁶⁹ But is this necessarily right? From the vantage point of the two-year undocumented resident there may be some unfairness in that result. If both men paid a smuggler to get them into the United States, the ten-year resident has presumably fully recouped his smuggling costs and enjoyed the wealth generating benefits of the United States, sent remittances back home,¹⁷⁰ and perhaps acquired new skills—like the English language—that increase his human capital.

Perhaps the ten-year resident also had citizen children. Stock critiques of crime-based deportation would point to these children and urge that maintaining their welfare as U.S. citizens should mean that the ten-year resident should stay irrespective of the criminal violation.¹⁷¹ Indeed, this is the main basis upon which immigration law provides a very narrow mechanism to excuse the criminal violation for noncitizens present without permission—it is the hook that links the noncitizen's interests to those of the self-interested state.¹⁷² But while the costs of familial estrangement are very real and very weighty, isn't the U.S. citizenship of his children one of the most valuable assets that the ten-year undocumented resident has gained for his residency? Par-

¹⁶⁸ This is outside the statute of limitations for prosecuting illegal entry, so the ten-year resident will avoid criminal sanction, though not deportation. 18 U.S.C. § 3282(a) (2012) (imposing five-year statute of limitations for noncapital federal offenses); *see also* United States v. Rincon-Jimenez, 595 F.2d 1192, 1193–94 (9th Cir. 1979) (applying the statute of limitations in 18 U.S.C. § 3282 to prosecutions under 8 U.S.C. § 1325, the statute criminalizing illegal entry into the United States).

¹⁶⁹ *See* Banks, *supra* note 72, at 1291–93 (citing to congressional testimony that raised concerns about harsh punishments for permanent residents who commit crimes due to their ties in American society).

¹⁷⁰ Noncitizens routinely send a portion of their earnings to family members who remain in their country of origin. These remittances can become a significant part of the economy in countries where a large portion of the population has emigrated. *See, e.g., Remittances to Developing Countries Edge Up Slightly in 2015*, THE WORLD BANK (Apr. 13, 2016), <http://www.worldbank.org/en/news/press-release/2016/04/13/remittances-to-developing-countries-edge-up-slightly-in-2015> (detailing the significant dollar amounts sent to developing countries in remittances and their importance in providing access to resources in these countries).

¹⁷¹ *See* Banks, *supra* note 72, at 1293–96 (explaining the negative impact of deportation on families); Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 111–15 (2011) (using adverse possession and property law theory to argue that longstanding undocumented migrants have the right to remain); Stumpf, *supra* note 11.

¹⁷² *See* 8 U.S.C. § 1229b(1)(D) (2012) (providing relief from deportation for deportable residents who lived in the United States for at least ten years if the noncitizen can prove “exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence”).

ents value the horizon of opportunity that they can provide for their children. Had the ten-year resident been deported prior to having children, he may not have been able to provide his future children with this potentially transformative gift.

The noncitizen deported after two years has none of these benefits to show for his time in the United States. He may have failed to recoup his smuggling costs, and has probably failed to send home substantial remittances to his country of origin, ensuring that, on return, his time in the United States will be viewed as folly or failure, and certainly as shameful—another form of punishment¹⁷³—by his native community.¹⁷⁴ So, if we assume, as most scholars do, that there is no basic entitlement for an alien to immigrate at all,¹⁷⁵ then the wealth the long-term migrant gained during the period of “illegal” presence is a kind of unjust enrichment that cannot be clawed back, making the long-term undocumented immigrant who is deported arguably better off than the recent arrival.

It does not necessarily follow from this analysis that enforcement actions should be prioritized against longstanding immigrants, instead of recent ones, only that the longstanding immigrant often has concrete valuable material gains based on his lengthier tenure which mitigate to some extent the emotional and other losses that deportation entails. On inspection, then, the balance of equities for the longstanding resident and the recent arrival might not be as far off as the literature makes it out to be.

These tensions in the arguments that crime-based deportation is disproportionate showcase again the literature’s longing for unconditional membership; for the logic of birthright citizenship—presence equals membership—to apply to as large a swath of the noncitizen population as is possible. Scholars try to smuggle these arguments into the calculus of the self-interested state,¹⁷⁶ but they don’t hold up well in that framework.

My skeptical take on these core critiques of crime-based deportation show that these arguments are in conflict with the key working

¹⁷³ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631–52 (1996) (advocating the use of shaming punishments as an effective means of criminal sanction).

¹⁷⁴ See M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 395 (2010) (showing how crime-based deportees initially feel shame upon their return to their countries of origin).

¹⁷⁵ See, e.g., MOTOMURA, *supra* note 137, at 92 (urging that citizen-determined immigration regulation is necessary to secure national social cohesion and internal equality).

¹⁷⁶ See *infra* Part I.

norm of contemporary immigration law and policy: that the United States adopts immigration regulation for the benefit of its citizens.¹⁷⁷ Were the federal government to adopt the idea of unconditional membership, it would be principally out of regard for the interests of noncitizens themselves, not the citizenry's own interests considered from a "nation's-eye" view. Refraining from crime-based deportation, after all, requires a political community to take ownership over a noncitizen's future criminal risk, rather than export that risk—via deportation—to the noncitizen's country of origin. Exercising this kind of restraint requires an expansive ethic of community membership capable of treating noncitizens like full members of the political community; an ethos that, in effect, erases nationally-imposed distinctions between noncitizens and citizens. The membership of the former is defeasible; the latter is not. To refrain from deportation is to treat a noncitizen as a citizen. Unconditional membership, then, cannot be reconciled with the most basic assumptions of contemporary immigration law and policy. This conflict suggests that crime-based deportation cannot be transformed at the national level since it conflicts with a basic tenet of nationalism. Reformers may be able to secure marginal improvements at the federal level, as they did with the implementation of President Obama's Priorities Enforcement Program (PEP),¹⁷⁸ whose clear hierarchy of crime-based deportation priorities¹⁷⁹ made the likelihood of crime-based deportation in any given case far more predictable, but the unconditional membership enjoyed by European immigrants from the Depression through the post-war period is not on the table in Washington. The PEP program itself made this quite clear; rather than fortify unconditional membership, PEP laid out a hierarchy of *conditions* on membership.¹⁸⁰ So even as PEP mitigated some of the harshest aspects of crime-based deportation, its rationalization of the practice—by creating a meaningful and enforceable agency hierarchy governing crime-based deportation—also signaled crime-based deportation's renewal and permanence at the federal level.

¹⁷⁷ Posner, *supra* note 74, at 291.

¹⁷⁸ See Memorandum from Jeh Charles Johnson, Sec'y of Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf't et al. 1 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (detailing a new prioritization regime for immigration enforcement).

¹⁷⁹ See *id.* at 3–6 (listing threats to security as a higher priority than misdemeanants, new immigration violations, and other immigration violations).

¹⁸⁰ *Id.*

II

THE CHALLENGE OF UNCONDITIONAL MEMBERSHIP

Part I laid bare how unconditional membership for noncitizens cannot coherently be reconciled with the logic of the self-interested nation-state: it does not *fit* in “nation.” Arguments for transforming crime-based deportation can be forced into the framework of national self-interest, but the awkward fit is apparent on close inspection. A clear-eyed assessment of unconditional membership shows that maximizing the benefits of immigration on behalf of the citizenry conflicts irreconcilably with the unconditional, noncitizen-centered norms that underwrite critiques of crime-based deportation.

As a result, transforming crime-based deportation at the national level is probably impossible to achieve.¹⁸¹ Crime-based deportation is likely to get worse—not better. This was true even before President Trump. Congress may increase its already enormous immigration enforcement budget, or strike comprehensive immigration reform bargains that trade legal status for some undocumented noncitizens in exchange for harsher noncitizen enforcement practices in the future, as it has in the past.¹⁸² In such a bargain there may be room for tinkering at the margins of crime-based deportation, but the paradigm shift that critiques of crime-based deportation demand will not emerge if national control remains in place.¹⁸³

¹⁸¹ See Fan, *supra* note 8, at 133 (arguing that the transformation of crime-based deportation is not feasible and that scholars and activists should settle for incremental reforms).

¹⁸² President Reagan’s comprehensive immigration reform bill in 1986 cast the die for reform bargains ever since: amnesty for undocumented immigrants is paired with increases in immigration enforcement efforts. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 101, 111, 201, 100 Stat. 3359, 3360–61, 3381, 3394–96 (codified in scattered sections of 8 U.S.C.); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1178–79 (5th ed. 2009) (discussing the 1986 amnesty law and its aftermath); see also Daniel I. Morales, *It’s Time for an Immigration Jury*, 108 NW. U. L. REV. COLLOQUY 36, 39–41 (2013) (outlining the enforcement challenges to proposed comprehensive reforms).

¹⁸³ Beyond the foundational conflict between unconditional membership and nationalism described in Part I, numerous practical political barriers stand in the way of unconditional membership’s national consolidation. Most important are bicameralism and the underrepresentation of urban jurisdictions in both houses of Congress. Less densely populated areas, which tend to favor immigration restriction, are systematically underrepresented in Congress. See Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 239 (2013) (“Democrats are inefficiently concentrated in large cities and smaller industrial agglomerations such that they can expect to win fewer than 50% of the seats when they win 50% of the votes.”); Jowei Chen & Jonathan Rodden, *Don’t Blame the Maps*, N.Y. TIMES (Jan. 24, 2014), <http://www.nytimes.com/2014/01/26/opinion/sunday/its-the-geography-stupid.html> (“Democrats receive more votes than seats because so many of their voters reside in dense cities that Democratic candidates win with overwhelming

Where Part I looked at crime-based deportation from on high, this Part zooms in to the level where ethics like unconditional membership are cultivated—person by person, story by story, place by place. When unconditional membership thrived, it thrived in part because citizens—to some important degree—accepted noncitizens as their own, as human beings and members of their communities whose crimes were evidence of human frailty, not bad character.¹⁸⁴ My claim is that this kind of “inclusive sympathy”¹⁸⁵ for noncitizens who have committed crimes could blossom in many jurisdictions under a regime of autonomous, local crime-based deportation control, even though it cannot gain traction on the national stage.

Here I begin to elaborate the reasons why localities offer more fertile soil for the growth of unconditional membership. The reasons emerge from my retelling of a story of a drug-hazed murder committed by a respectable and hardworking undocumented immigrant in the Washington D.C. suburbs. The banal cause of the immigrant’s turn from respectable undocumented immigrant to murderer illustrates how the fundamental “cause” of immigrant crime is human frailty: the fact that all humans are ultimately unknowable and possess some unknown capacity to engage in disordered behavior.¹⁸⁶

The ultimate mystery of human beings systematically instills terror when encountered from a national perspective, while a local point of view offers additional possibilities, like acceptance of the unknown and the unpredictable. Consuming a lurid immigrant crime narrative through a national lens triggers a fear that echoes a central message of Donald Trump: If human frailty causes crime, then every

majorities, while Republican voters are more evenly distributed across exurbs and the rural periphery.”). The Senate, of course, dramatically exacerbates this inequity, grossly overrepresenting small/rural states. Moreover, bicameralism, the Senate’s cloture procedure, and other procedural rules make it very simple for these overrepresented areas to veto legislation. See William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 757–60 (2012) (describing the many “vetogates” in the American legislative process that can stifle the passage of legislation). This veto means, of course, that it is harder to pass pro-immigrant immigration legislation, but the veto threat also means that any legislation that does pass muster will be more restrictive than the median viewpoint of the citizenry on immigration issues and far to the right of the viewpoint of sanctuary jurisdictions.

¹⁸⁴ See NGAI, *supra* notes 59–63 and accompanying text.

¹⁸⁵ NUSSBAUM, *supra* note 69 and accompanying text.

¹⁸⁶ The use of actuarial methods in criminal punishment, as in immigration screening, provides the illusion that we can predict future criminal behavior, when, in fact, our predictive abilities are incredibly poor. See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007) (critiquing predictive methods of policing and punishment).

immigrant is a potential threat, every immigrant—like any human—is a potential “rapist,” “druggie,” “killer,”¹⁸⁷ or terrorist.

But things look different to a local resident and friend of the murder victim. This friend accepts the murderer’s human frailty and the randomness of the violence it unleashed, and rejects the idea of modifying immigration policy in response to an isolated and unfathomable act of violence. The question for Part III, then, is where—at what level of government—can this grounded sentiment possibly gain policy traction?

A. *The Banality of Violent Immigrant Crime*

The violence of the crime committed by the undocumented immigrant that I recount here is horrifying, but what is more striking is the banality of its source. The undocumented immigrant who brutally murdered a nineteen-year-old woman looks much like many undocumented migrants—hardworking, a father, no serious criminal record.¹⁸⁸ What drove him to kill was his human frailty, something that every immigrant has, regardless of his legal status. This non-citizen-turned-murderer’s particular frailty was drug addiction. The banality of the cause of this crime exposes and underscores the way that fear of immigrants is grounded in their fundamental mystery—their basic, human unknowability. Every immigrant—like every citizen—poses a “risk” of violence because every immigrant is human. The success with which this human mystery and the fear it inevitably elicits is managed by the legal and political system will to a significant extent determine the degree to which noncitizens are embraced by a society.¹⁸⁹

Recounting this real-life story both allows the reader to consume the lurid tale as an average citizen would, and in doing so underscores the biased way in which the citizen-centered state evaluates the harm and probability of noncitizen crime. The calculus of the self-interested

¹⁸⁷ Early in the Republican primary campaign, Donald Trump galvanized support for his candidacy by writing on Twitter: “Druggies, drug dealers, rapists and killers are coming across the southern border. When will the U.S. get smart and stop this travesty?” Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2015, 7:22 PM), <https://twitter.com/realdonaldtrump/status/612083064945180672>; see also Elizabeth Drew, *Trump’s Long Game*, N.Y. REV. BOOKS (May 6, 2016), <http://www.nybooks.com/daily/2016/05/06/trumps-long-game-becoming-general-election-candidate/> (“The shocking claim in Trump’s announcement speech last June that Mexico ‘sends us’ rapists and murderers was in fact a considered and critical element of the campaign he was about to wage.”).

¹⁸⁸ MARC R. ROSENBLUM, MIGRATION POL’Y INST., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 11 (2015).

¹⁸⁹ Martha Nussbaum emphasizes that the political and legal management of “political emotion[s],” public emotional responses to public life, is critical to the success and justice of liberal democratic states. See NUSSBAUM, *supra* note 69, at 386, 388–90.

state inherently rationalizes crime-based deportation for even minor crimes, as Part I showed, but the manner in which the calculus takes effect—via citizens’ perceptions of immigrant crime—further entrenches and exaggerates the built-in bias for crime-based deportation at the national level. The Philosopher King does not execute the national self-interest calculus—citizens and their political representatives do. This citizen-driven method of constituting self-interested immigration law—which formally excludes immigrant voices—greatly exaggerates the risk of harm that immigrants pose. The ethic of unconditional membership is no match for these forces, as I will show below.

On to the story.¹⁹⁰ On June 27, 2010, a few hundred yards from the Capital Beltway, Vanessa Pham had just finished having her eyebrows done at the JD Nail Salon in Fairfax, Virginia.¹⁹¹ Vanessa was having a good day. The nineteen-year-old fashion-design student had received a text from her boyfriend Aaron, saying that he would be visiting her from Ohio over the weekend.¹⁹² Vanessa had also just received word that a family had hired her to nanny their children during her summer break from college.¹⁹³ She let everyone know about her new gig on Facebook, writing, in reference to the lead actress in the hit American TV show *The Nanny*: “Call me Fran Drescher. I’m a nanny!”¹⁹⁴ As she left the nail salon, Julio Miguel Blanco-Garcia, carrying his infant daughter, asked Vanessa for a ride to the hospital. Vanessa obliged. Within the next thirty minutes, Vanessa was dead—stabbed multiple times with a butcher’s knife and left to bleed out at the bottom of a ravine.¹⁹⁵

For two and a half years, the Fairfax police had little sense of what had happened to Vanessa.¹⁹⁶ They had some clues, including a fingerprint left on the murder weapon, but no matches turned up until December 2012.¹⁹⁷ That month, Garcia stole three bottles of champagne from a grocery store in McLean, Virginia and was arrested and fingerprinted.¹⁹⁸ The fingerprint was loaded into a regional database

¹⁹⁰ See generally Justin Jouvenal, *Pretrial Filings Reveal Details in 2010 Killing of Falls Church Teen Vanessa Pham*, WASH. POST (Aug. 8, 2013), https://www.washingtonpost.com/local/pretrial-filings-reveal-details-about-2010-killing-of-falls-church-teen-vanessa-pham/2013/08/08/aec8b870-fff3-11e2-9a3e-916de805f65d_story.html?utm_term=.437ce3433497.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

and came up a match for the print found on the knife that killed Vanessa.¹⁹⁹ From there, the case proceeded to speedy resolution: interrogation, confession, trial, conviction, and a forty-nine year prison sentence.²⁰⁰

In that whirlwind, Julio's story came out too.²⁰¹ He had struggled with substance abuse for many years.²⁰² He met his ex-wife in 2004 when he managed a McDonald's in Tysons Corner, Virginia.²⁰³ She reported that he occasionally smoked crack-cocaine and turned violent when he did.²⁰⁴ They divorced a few years later, without children.²⁰⁵ Julio was on phencyclidine (PCP) the day of Pham's murder.²⁰⁶ He had a handful of previous arrests, including one for allegedly brandishing a knife at a security guard.²⁰⁷ The morning of the murder, he had driven to D.C. with his daughter to buy \$400 worth of PCP, an amphetamine, and told police that he dipped three cigarettes in liquid PCP and smoked them before heading to the shopping center where he eventually approached Vanessa.²⁰⁸ In his video-taped confession to police, he "said he approached Pham . . . after he had smoked too much PCP. He was in distress and had his 1-year old daughter with him."²⁰⁹ "I'm not a bad guy,"²¹⁰ Julio said in the video. "I was just so high that time."²¹¹ Julio was hallucinating, and when Vanessa took a wrong turn on the way to the hospital, he thought he and his daughter were in danger. He was afraid that Vanessa would

¹⁹⁹ *Id.*

²⁰⁰ Rachel Weiner & Justin Jouvenal, *Man Convicted of Killing 19-Year-Old Vanessa Pham Sentenced to 49 Years in Prison*, WASH. POST (Nov. 15, 2013), http://www.washingtonpost.com/local/crime/man-convicted-of-killing-19-year-old-vanessa-pham-expected-to-be-sentenced-friday/2013/11/14/c0bd9e38-4d5f-11e3-be6b-d3d28122e6d4_story.html.

²⁰¹ Justin Jouvenal, *Suspect in Murder of Falls Church Woman Was Tracking Probe, According to Warrant*, WASH. POST (Jan. 10, 2013), https://www.washingtonpost.com/local/crime/suspect-in-murder-of-falls-church-woman-was-tracking-probe-according-to-warrant/2013/01/10/c8bb675a-5b5c-11e2-9fa9-5fbc9530eb9_story.html.

²⁰² Jouvenal, *supra* note 190.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *Id.*

²⁰⁹ Justin Jouvenal, *Accused in Vanessa Pham's Killing Told Police: 'God Is Not Going to Forgive What I Did.'* WASH. POST (Aug. 21, 2013), https://www.washingtonpost.com/local/dna-on-knife-used-in-students-slaying-was-likely-from-killer-expert-testifies/2013/08/21/00682a78-0a79-11e3-b87c-476db8ac34cd_story.html?utm_term=.Aa9428aa8f01; *see also Garcia Admits to Killing Vanessa Pham*, WASH. POST (Aug. 22, 2013), https://www.washingtonpost.com/posttv/local/garcia-admits-to-killing-vanessapham/2013/08/22/669f3680-0b67-11e3-9941-6711ed662e71_video.html (showing a partial video of Garcia's confession).

²¹⁰ Jouvenal, *supra* note 209.

²¹¹ *Id.*

call the police, so “he grabbed a large butcher knife from his backpack and stabbed her [thirteen times].”²¹² “She was crying,” Julio said. “She didn’t say anything.”²¹³ Julio tried to drive Vanessa’s car, but ended up crashing it. After the crash, he grabbed his daughter and exited through the sunroof.²¹⁴ At the end of the interrogation, Julio said that if he could trade his life for Vanessa’s, he would. “Many times I thought about telling police, but I didn’t want to leave my family I asked her to take me to hospital. She took me. She had a good heart. That’s why I feel so bad.”²¹⁵ Julio is a Guatemalan national living as an undocumented immigrant.²¹⁶ Although it is unclear when he arrived exactly, he has certainly been in the United States since 2004, and presumably sometime before that.²¹⁷ Against the cold fact that immigrants commit fewer crimes in the United States than their native-born socioeconomic peers, Julio’s story is a vivid and tragic exception. This story garnered at least a half a dozen articles from the *Washington Post* and produced relentless local TV news coverage broadcast to the masses.²¹⁸ Indeed, the trial was available for public consumption on television: For the first time since 1994, the Fairfax County judge presiding over Julio’s trial permitted cameras in the courtroom.²¹⁹ Julio’s confession was seen by anyone watching the coverage of the trial on TV.

Consider now how this story preys on the orthodox critique of crime-based deportation and the unconditional membership ethic that underpins it. Take the stock objection that those who enter without permission or stay unlawfully should not be branded criminals because, while they are undocumented, they are not criminal invaders.²²⁰ One prominent reason why that argument has so much currency is that most migrants labor, and it seems discordant to mark laborers as criminals for laboring, no matter their violation of immi-

²¹² *Id.*; see also Weiner & Jouvenal, *supra* note 200.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See Jouvenal, *supra* note 201.

²¹⁷ See *id.* (noting that Julio met his ex-wife in the United States in 2004, where he was a manager at a Tysons Corner McDonald’s).

²¹⁸ See, e.g., *Bloody Evidence Presented in Vanessa Pham Murder Trial*, NBC WASH. (Aug. 20, 2013, 3:12 PM), <http://www.nbcwashington.com/news/local/Testimony-Resumes-in-Julio-Blanco-Garcia-Murder-Trial-220322581.html>.

²¹⁹ Tom Jackman, *Fairfax Judge Allows Cameras in a Trial for the First Time Since 1994, and That’s a Good Thing*, WASH. POST (July 29, 2013), <https://www.washingtonpost.com/blogs/local/wp/2013/07/29/fairfax-county-judge-allows-cameras-in-a-trial-for-the-first-time-and-thats-a-good-thing/>.

²²⁰ See *supra* Section I.A (discussing these objections to crime-based deportation).

gration law.²²¹ Julio fit that mold: He rose to be a manager at McDonald's and continued to work after the murder as a day laborer on construction sites in Northern Virginia.²²² But if Julio was the good undocumented migrant for laboring, he broke bad. This is not to say that Vanessa's murder revealed a profound evil in him that was always there, but rather that his actions stemmed from a common human frailty—substance abuse—the risk of which enters the country along with the undocumented person who labors.

Another tenet of the orthodox critique is that grounds for deportability are overinclusive. Petty drug offenses come in for particular criticism.²²³ And yet here we have a case where recreational drug use, Julio's PCP-soaked hallucinations, was likely the proximate cause of Vanessa's death. Had he been caught with the drugs and deported, Vanessa would not be dead.

Those in favor of unconditional membership can respond with probabilistic thinking, pointing out that few migrants use drugs and even fewer do in ways that lead to murder or mayhem. However, this may be little comfort to the mind primed with the facts of Vanessa's death.²²⁴ And after all, some migrants do cause harm under the influence of drugs. If we think carefully about the relationship between population growth and crime, we must accept that undocumented migration, like documented migration of people with similar demographic markers, will increase the *gross*—though perhaps decrease the

²²¹ See Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C. R. & C. L. 23, 65 (2009) [hereinafter *Democracy's Shadow*] (noting that the toil of immigrants helped them to earn social respect and membership in the United States).

²²² See Jouvenal, *supra* note 201 (noting that Julio was a manager at McDonald's when he met his wife and that he was arrested at a job site after the murder); see also Shachar, *supra* note 171, at 155 (citing work as an act that can lead someone to become rooted in a particular society irrespective of the legality of their immigration status).

²²³ See Morawetz, *supra* note 9, at 1953 n.101 (referencing an incident where a teenage son committed suicide after his father was deported for selling a ten dollar bag of marijuana).

²²⁴ Psychologist Daniel Kahneman developed a theory of human cognition that demonstrates that the brain is heavily biased due to its reliance on mental short-cuts or rules-of-thumb called heuristics. See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). These heuristics make humans very poor probabilistic thinkers and highly susceptible to building a skewed picture of reality based on the vividness of depictions of events, as well as the recentness of those events. See *id.* at 130 ("Personal experiences, pictures, and vivid examples are more available [to the mind] than incidents that happened to others, or mere words, or statistics."); see also Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 757–59 (2003) (positing the existence of availability cascades, where "media coverage of gripping, unrepresentative incidents" creates durable and empirically invalid social beliefs about social phenomena). Vanessa Pham's murder is a good example of an event that would trigger such "hazardous heuristics."

per capita—risk of drug induced bad behavior, simply because immigration itself grows the population.²²⁵

Some “good” migrants end up in a bad way. When measured in gross acts of violence, more immigration—that is, more people—leads to more disordered behavior, even though immigrants in the aggregate have a lower average criminal propensity than native-born Americans. And the fact that there are more gross incidents of criminal activity by noncitizens increases raw opportunities for politicians or other norm entrepreneurs to stoke misperceptions about per capita risks and generate legislative heat in opposition to unconditional membership.²²⁶

Cases of banal malfeasance, like drug use or DUIs, pose serious challenges to unconditional membership and even for immigration levels, since the national policy response that would most reliably lower their gross incidence is precisely what the orthodox critique rejects—more deportation for low-level crimes and less immigration generally. And so, following the logic of the self-interested state, stories like Vanessa’s build the case *for* crime-based deportation and lower immigration levels by suggesting the possibility that any undocumented migrant—even the good, hard-working kind—could become a killer.

This kind of fear, stoked at a national level, makes the ground-level execution of the self-interest calculus even less conducive to unconditional membership than it seemed in Part I.

B. *The Germ of Unconditional Membership*

Vanessa Pham’s murder became a national story that received particularly thorough coverage on right-wing media. Much of that national reaction tracked the fear-amplified, nationalist state logic described above.²²⁷ But a close friend of the murder victim had a very different take on the meaning of Vanessa’s murder for crime-based deportation law and policy:

²²⁵ Additionally, as Elina Treyger has shown, there are some populations of immigrants that *are* criminogenic in certain contexts. See Elina Treyger, *Migration and Violent Crime: Lessons from the Russian Experience*, 27 GEO. IMMIGR. L.J. 257, 260–61 (2013) (arguing that whether immigrants increase or reduce crime rates depends on who the immigrants are and the context into which they immigrate).

²²⁶ See Sunstein, *supra* note 224 and accompanying text.

²²⁷ See, e.g., Michelle Malkin, *The Illegal-Alien Murderer of Vanessa Pham*, NAT’L REV. (Aug. 14, 2013), <http://www.nationalreview.com/article/355716/illegal-alien-murderer-vanessa-pham-michelle-malkin> (categorizing “repeat convicted criminal aliens” as “foreign-born thugs, druggies, sex offenders, murderers, and repeat drunk drivers who are destroying the American Dream”).

Blanco-Garcia's history of breaking petty laws is no more a prediction of a violent murder than the fact that he was an undocumented immigrant. Research shows this to be the case.

This is difficult to say, but I do not believe there was a single government policy that could have saved Vanessa's life.

Could she have benefitted from gun laws that would have allowed her to carry a firearm at 19? Sure. Could the healthcare industry be reformed to reduce cost, affording Blanco-Garcia accessibility to an ambulance? Sure. Could the immigration system be changed to efficiently remove immigrants with violent criminal records in the United States? Absolutely.

However, none of these things would have guaranteed that Vanessa got home that night.

That's the thing about senseless tragedies: they leave us grappling with unanswerable questions. Even if America had a utopian set of laws and policies, horrific things can and do still occur. This is human nature. Our lives are shaped daily by an intricate series of policies, but we cannot define the merit of those policies by extraordinary outliers such as a man high on mind-altering drugs murdering a sweet girl who offered him and his daughter a ride to the hospital.²²⁸

Using the tragic story of a young girl who was murdered by an immigrant as an excuse to smear undocumented immigrants as cold and violent is wrong.²²⁹ This friend of Vanessa's gives clear expression to a building block of unconditional membership: She accepts the human frailty of her friend's murderer and the fundamental mystery and unpredictability of human nature. She accepts that some things in life are senseless and random—outliers that no degree of technocratic tinkering can correct. She rejects the terror of “the other” that the nationalist lens instills.

Of course, human beings have a wide range of emotional reactions to such events. Many people would have the opposite reaction to the loss of a loved one, continuing to think the loss was avoidable, and advocate on that basis for policy changes they believe might have saved the life of their lost loved one.

But the question for those who want to see unconditional membership gain traction is this: What level of government is able to see immigrant crime in the way that Vanessa's friend does? In the next Part, I make the case that the acceptance of noncitizens' human frailty will be better received at lower levels of government than at the

²²⁸ Nikki West, *The Day Strangers on the Internet Used My Friend's Murder to Score Political Points*, RARE (July 10, 2015, 8:36 AM), <http://rare.us/story/the-day-strangers-on-the-internet-used-my-friends-murder-to-score-political-points/>.

²²⁹ See *id.*

national level. Some local governments can nurture unconditional membership.²³⁰

III

FINDING SPACE FOR UNCONDITIONAL MEMBERSHIP

The murder of Vanessa Pham is exceptional in the sense that its particulars do such thorough violence to the orthodox critique of crime-based deportation. It is also exceptional in the statistical sense because immigrants in Julio's socioeconomic stratum commit violent crime at far lower rates than the native-born population.²³¹ Still, Julio's crime is also emblematic. Other immigrants will continue to commit violent crimes, and supporters of the unconditional membership project need to directly address this fact. The central challenge of managing citizens' perceptions of immigrant crime is persuading citizens that these lurid incidents are the exception that proves the rule that immigrants dilute per capita criminal risk. Achieving that end requires placing this conversation about immigrants and crime in a forum that recognizes and empathizes with immigrants' human frailty, and empowering that forum to make policy out of that empathy.

²³⁰ The immigration federalism literature explores the relationship between local, state, and national control in the context of immigration regulation. As a matter of doctrine and practice, immigration federalism is characterized by an unusual amount of discretionary authority placed in the executive branch, and an unusually strong brand of preemption of state regulatory power. See Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2083–90 (2013) (discussing the history of immigration federalism and the case law consolidating national control over immigration); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (describing the distinctive characteristics of immigration federalism); see also David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 991–94 (2016) (detailing the numerous ways in which immigration regulation, in practice and theory, runs against the grain of federalism and separation of powers doctrines). In her seminal article, Cristina Rodríguez was the first to argue that local power in immigration matters had a constructive dimension. Rodríguez, *supra* note 30. While the co-dependent relationship between local and national entities is by now well established, few scholars have advocated for further decentralization of immigration control as a normative good. *But see, e.g., supra* note 12 and accompanying text. The bulk of immigration law scholarship remains suspicious of local control, even as pro-immigrant localities—sanctuary jurisdictions—have exposed the immigrant-affirming possibilities of local control. *See, e.g.,* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 57–86 (2015) (describing how local anti-immigrant ordinances were a means of affecting legislation upstream at the national level). *But see* Markowitz, *supra* note 15, at 910–12 (articulating the pro-immigrant possibilities of state law). Rodríguez, for her part, has accepted the immigration federalism status quo post-*Arizona*. Cristina M. Rodríguez, *Toward Détente in Immigration Federalism*, 30 J.L. & POL. 505, 505–06 (2015) (calling for a “détente” in the battle between national and local control in light of *Arizona v. United States*, 567 U.S. 387 (2012)).

²³¹ See *supra* notes 82–85.

In this Part, I show that local governments are better suited to resisting the corrosive effects of immigrant crime discussed in Part II. I illustrate the point by taking the facts of Julio's crime and imagining how they might move citizens and politicians on the local versus the national stage. I undertake this thought experiment with another hypothetical wrinkle: I assume that Congress delegates the full extent of its sovereignty over immigration matters to local governments.²³² The comparison shows that pro-immigrant local jurisdictions that have fought the federal government's efforts to increase crime-based deportation—known as sanctuary cities—are far more structurally suited to resist shocks to unconditional membership, like lurid immigrant crimes, than Congress is, making these local geographies fertile ground for developing and preserving the ethic of unconditional membership.

A. *The Perils of Centralized National Control*

What happens when a violent immigrant crime is digested at the national level? The answer is no mystery: These crimes have been repeatedly used over the last few decades to make changes to immigration law that increase the frequency of crime-based deportation.²³³ They are grist for the crime-based deportation mill. Immigrant crime is just more evidence of crime-based deportation's necessity. That immigrant crime happens despite crime-based deportation is proof that more crime-based deportation is still needed.

At the national level, the public, media-driven post-mortem that attends an immigrant crime flattens the crime into an immigration issue rather than the multi-dimensional problem of crime control, human frailty, *and* immigration law that it is.²³⁴ At the national level, when an immigrant commits a crime, it is interpreted as a failure of immigration law or immigration law enforcement: Immigration agencies made a mistake in admitting the immigrant or failing to deport him earlier. Immigrant crimes are signs of sub-optimality, according to

²³² I use "sovereignty" here to mean the autonomy to decide a particular policy question, in a way that is unreviewable by a co-sovereign—here, the national government. *See, e.g.*, Gerken, *supra* note 16, at 7 (describing sovereignty this way). In this Article, I am disaggregating immigration sovereignty and imagining the delegation of just one piece of that power, the power to deport based on criminal contact, commission, or conviction. In future work, I plan to explore the design of a more fully decentralized immigration system.

²³³ *See, e.g.*, Banks, *supra* note 72, at 1278–80 (describing how unrepresentative stories about noncitizen criminals were used to make immigration law dramatically harsher); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360 (2014) (describing how members of Congress used stories of immigrant criminals to expand dramatically the scope of immigration detention).

²³⁴ *See generally* Malkin, *supra* note 227 (providing an example of this logic).

the logic of the citizen-governed, self-interested state.²³⁵ Julio, for instance, was “illegally” present in the United States when he killed Vanessa, so the national government failed to keep him out of the country. Absent that failure, Vanessa would be alive.²³⁶

National control also triggers the media (and entrepreneurial members of Congress) to nationalize noncitizen murders that would otherwise be confined to local reportage.²³⁷ Thus an isolated murder by a noncitizen stokes fear of migrant crime and uncontrolled borders in every corner of the United States.²³⁸ This nation’s-eye view, in turn, points to solutions like reducing undocumented populations and reigning in localities which tolerate or embrace such populations—an immigration approach, rather than a crime control or drug-abuse approach. In this way, the national lens obscures non-immigration approaches to mitigating the risks of migrants’ human frailty.²³⁹

These high-saliency triggers to legal and policy reform also drive further centralization of crime-based deportation control when digested at the national level, since more centralized and uniform control over immigrants is the only way for the national system to avoid being tarred as dysfunctional.²⁴⁰ More centralization further occludes

²³⁵ This is not the position of Cox and Posner, who posit the rationality of tolerating some immigrant crime as a proxy for the fitness of lower-wage workers to assimilate productively to American mores. See Cox & Posner, *supra* note 17, at 842. But Cox and Posner are working from an omniscient, god’s-eye view which does not account for the systemic biases at work in the implementation of their self-interest calculus.

²³⁶ This is just the logic used by right-wing commentators on Vanessa’s death. See West, *supra* note 228 (responding to an instance of this right-wing commentary).

²³⁷ See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 39–46 (2d ed. 2006) (discussing the importance of national media in creating and maintaining a sense of “nation” capable of sustaining nationalism).

²³⁸ This is the kind of heuristic cascade Cass Sunstein was referring to. See *supra* note 224 and accompanying text (discussing heuristics and availability cascades); see also Mary De Ming Fan, *The Immigration-Terrorism Illusory Correlation and Heuristic Mistake*, 10 *HARV. LATINO L. REV.* 33, 36–46 (2007) (discussing how false heuristics—like the false correlation between immigration and terrorism—become embedded in legislative decisionmaking and produce bad law).

²³⁹ This is one of the principal arguments localities have used to resist federal efforts to commandeer them into enforcing immigration law. Dissenting localities have long argued that mixing immigration enforcement with their regular policing duties would corrode local trust in law enforcement and imperil the primary imperative of local police: to keep residents safe. See, e.g., Letter from the Law Enforcement Immigration Task Force to Chuck Grassley, Chairman, Senate Comm. on the Judiciary, and Patrick Leahy, Ranking Member, Senate Comm. on the Judiciary (July 20, 2015), <https://immigrationforum.org/blog/chiefs-and-sheriffs-oppose-immigration-enforcement-policies-undermining-community-policing/> (“[W]e have been alarmed to see various legislative proposals that would attempt to impose ineffective ‘one-size-fits-all’ policies that would cause great harm to our departments and our communities. . . . These proposals . . . would threaten crucial federal law enforcement funding and undermine basic community policing principles.”).

²⁴⁰ For this point, I am drawing on the public-choice literature showing that agencies seek to aggrandize themselves and protect their reputation for competence in order to

other non-immigration frames for addressing the human frailty at the core of migrant crime.

There are limits to how centralized immigration control can be. Crime-based deportation is necessarily dependent on the commandeering of local law enforcement actors, since criminal law enforcement is a quintessential local function.²⁴¹ Indeed, this cooperative federalism structure creates space for dissent—“uncooperative federalism”²⁴²—from the goals of the self-interested state in more pro-immigrant jurisdictions.²⁴³ But this space for dissent—that is, for unconditional membership—is threatened by lurid immigrant crimes when the national government retains centralized policymaking authority. The national government may be dependent on local government cooperation, but it has many levers at its disposal to alter the local calculus of cooperation.²⁴⁴

Just recently, in response to a murder in San Francisco (which has a sanctuary law), Congress commenced hearings and drafted legisla-

draw more resources from the state. This framing of agency incentives suggests that federal agencies would be likely to push to increase the scope of their authority over a given domain in a cooperative federalism context where the national government will bear some or all of the blame for administrative error. *See, e.g.*, Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 878 (2008) (“Federal agencies, after all, have no mandate to represent state interests and possess strong countervailing incentives to maximize their own power and jurisdiction.”). *But see* Treyger, *supra* note 15, at 136–38 (urging that local control of the criteria for deportation is more effective than national control).

²⁴¹ *See* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 293 (2011) (discussing the traditional primacy of state and local control of the criminal law).

²⁴² *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1281–82 (2009) (discussing local immigration “noncooperation” laws, which thwart federal attempts to force states to assist with immigration enforcement, as examples of uncooperative federalism).

²⁴³ Cooperative federalism, and local power more generally, can leave space for what Heather Gerken calls “dissenting by deciding.” Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005). Localities that resist cooperation with federal enforcement priorities engage in a weak form of this kind of dissent. *See id.* at 1754 (describing the major distinctions of decisional dissent, as compared to conventional dissent, namely that “(1) dissenting by deciding is embodied in a decision, not an argument; (2) it gives electoral minorities a chance to speak truth *with* power . . . ; and (3) dissenters who decide are able to act with the authority of the state *collectively* rather than in relative isolation”); Treyger, *supra* note 15, at 161–62 (discussing the sanctuary and noncooperation policies of Cook County, Illinois, the State of California, and Washington, D.C.).

²⁴⁴ *See* Rubenstein, *supra* note 230, at 1006 (arguing that the federal government could tie federal subsidies for localities to cooperation in immigration enforcement). *But see* Ilya Somin, *Federalism, the Constitution, and Sanctuary Cities*, WASH. POST: VOLOKH CONSPIRACY (Nov. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.6a5483d24853 (arguing that Supreme Court precedents would severely limit such attempts).

tion to force sanctuary jurisdictions into line by forbidding sanctuary laws.²⁴⁵ Congress did this even though it was far from clear that the sanctuary law played any role in the incident.²⁴⁶ Yet the move to national uniformity and control makes perfect sense from the point of view of the citizen-administered self-interested state.²⁴⁷ Bringing to heel localities that deviate from national goals would represent improvement at the margins of national self-interest. Enforcement would be more efficient (noncooperation can raise costs per deportation), permitting higher numbers of deportations. In this way, crimes digested by national politics spur further centralization of crime-based deportation policy, and squeeze out space for unconditional membership.

These insights should not be surprising, because, as Parts I and II emphasized, the calculus of national self-interest operates at the margins and in the aggregate. Such abstraction necessarily flattens the nuance of local conditions: the dramatic variation of receptiveness to immigrants by locality,²⁴⁸ and the variation in what a crime committed in one locale might reveal about an immigrant's character compared to the same crime committed somewhere else.²⁴⁹ The national calculus

²⁴⁵ Emmarie Huetteman, *Republicans Look to Penalize 'Sanctuary Cities' that Shield Illegal Immigrants*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/republicans-look-to-penalize-sanctuary-cities-that-shield-illegal-immigrants.html>.

²⁴⁶ *Id.*

²⁴⁷ Elina Treyger argues that local control over questions of who gets deported, and federal control over the total number of deportations, is the most efficient arrangement. See Treyger, *supra* note 15, at 137. But her efficiency argument for a split between national and local responsibilities appeals most to an apolitical, technocratic mindset. The citizen-controlled regime is likely to see centralization of both functions as most efficient, in part because their biased perception of immigrant crime will cause them to overstate the risks to non-locals from immigrant crime. The San Francisco murder makes this case perfectly since the victim was a tourist. More broadly, Treyger's maintenance of a very significant role for federal officials would likely erode significantly the political support for decentralization over time for the reasons discussed above. Policy autonomy for localities on questions of crime-based deportation is a more politically stable decentralization arrangement.

²⁴⁸ See *id.* at 1390 (describing variation in local crime control needs and immigration preferences as good reasons to prefer decentralized prioritization of immigrants for crime-based deportation).

²⁴⁹ For example, in a highly policed neighborhood a conviction for drug possession might indicate very little on a consistent basis about a person's drug habits—for instance whether the person is addicted or not—because the neighborhood is highly policed and therefore most (or more) deviant behavior gets caught up in the criminal enforcement apparatus. In less heavily surveilled or policed areas, by contrast, an arrest or conviction for drug use more reliably targets pathological users since such users only come to the attention of the police at all if they behave in ways that make them outliers. Arrests and convictions frequently provide as much or more information about policing tactics as long-term criminal propensity and fitness to remain a member of a particular community. To the extent these arrests and prosecutions do provide information relevant to the deportation

has no way of gauging these differences: Julio's crime would simply represent evidence in favor of more and more centralized crime-based deportation.

Legislatively, nothing came of the incident in San Francisco, but the subpoenas and hearings²⁵⁰ generated by it may have sharpened the enforcement efforts of the vast immigration enforcement apparatus nationwide,²⁵¹ motivating the immigration agency to push harder against unconditional membership norms being nurtured in various sanctuary localities.²⁵² And there will certainly be other instances of lurid immigrant crime, and one of them will eventually be used to move national law and policy away from unconditional membership and further centralize national control, snuffing out sanctuary cities—the only spaces that have fought to revive and preserve the unconditional membership ethic for the twenty-first-century.

B. *The Rationality of Local Control*

Now, consider hypothetically a federalism arrangement that lodged sovereignty²⁵³ over crime-based deportation decisions at the

question, that information is reliably legible only at the local level, since local actors have the necessary contextual information to interpret the arrest or conviction.

²⁵⁰ See Huetteman, *supra* note 245 (noting that in response to the San Francisco incident, the Senate Judiciary Committee heard testimonies from relatives of victims of crimes committed by undocumented immigrants).

²⁵¹ See, e.g., Kalhan, *Immigration Surveillance*, *supra* note 65 and accompanying text.

²⁵² Calling heads of federal agencies to testify at congressional committee hearings is a classic way in which Congress seeks to exert influence on the policy and actions of executive agencies. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 125 (2006) (describing the many mechanisms Congress can use to align agency behavior with its preferences).

²⁵³ The classic federalism literature usually treats states as sovereign over decisions implicating their police powers. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979); Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1192–95 (1977). Local governments, by contrast, are legally mere creatures of the states, without any constitutionally-derived powers of "home rule." See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (holding that the power conferred upon municipal corporations "rests in the absolute discretion of the State"); cf. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2264 (2003) (arguing that "home rule," as originally conceived, did not necessarily involve local legal autonomy). Scholars have forcefully argued, however, that cities and other local entities are entitled to a certain amount of sovereignty as a constitutional matter. See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 498–501 (2009) (describing the rise of state-city charters that limited state legislative power over cities as an anticorruption measure); Richard Schragger, *Flint Wasn't Allowed Democracy: That's Part of the Reason Nobody Acted When Its Water Was Poisoned*, SLATE (Feb. 8, 2016 4:57 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/a_big_reason_for_the_flint_water_crisis_no_democracy_there.html ("At one time, judges and constitutional lawyers insisted there was a right to local self-government. Serious constitutional scholars, like Thomas Cooley . . . argued persuasively

local level.²⁵⁴ Also assume that Julio committed his crime in a locality that had embraced sanctuary commitments to noncitizens, opposing federal mandates to cooperate in the deportation of noncitizens who come in contact with local criminal law enforcement.²⁵⁵

Localities that have fought the federal government in an effort to protect immigrants' rights would be far more likely to embrace unconditional membership, were they granted the autonomy to do so. In the case that Fairfax County, Virginia (where Julio killed Vanessa) was the only policymaking body that had to digest this horrific murder, one likely scenario is that nothing happens at all apart from a robust criminal justice response. The full weight of the local criminal justice system will be brought to bear on Julio; he will be convicted and brought to justice. The immigration argument that dominates the national discussion—that Julio shouldn't have been in the United States in the first place—cannot generate the same frisson in Fairfax, since Fairfax's sanctuary commitment means Fairfax has already decided that Julio, despite his lack of *national* status, is part of the local community. That membership issue was settled by the choice to become a sanctuary jurisdiction, a decision which necessarily entailed a decision to tolerate some level of noncitizen crime. Since Fairfax has already taken ownership over noncitizens' human frailty in the way they do for national citizens, Vanessa's murder would likely represent a random, drug-induced tragedy, like so many other crimes. If local residents try to make an issue out of it, countervailing voices are more

that representative local government was a matter of 'absolute right' and could not be overridden by state legislative fiat."); see also Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 980 (2007) (describing how local governments have "successfully invoked federal law as a source of authority and a defense against state control").

²⁵⁴ Note that this would be a kind of reimagining of the status quo ante, where localities regulated newcomers, including immigrants, through warning out laws. See RUTH WALLIS HERNDON, *UNWELCOME AMERICANS: LIVING ON THE MARGIN IN EARLY NEW ENGLAND* 2–3 (2001) (outlining how eighteenth-century New England towns sent away people who had no legal claim to the town's treasury in a process called "warning out"). States with major ports of entry, like New York, took over regulating immigrants in the post-colonial era. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 75 (2006) (discussing how New York state regulated the costs of immigration).

²⁵⁵ So-called "sanctuary cities" have adopted a wide variety of policies that refuse cooperation to some degree and in quite specific ways with national immigration enforcement actors. For descriptions and analysis of these jurisdictions' laws and their impact on immigrants, see Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 25–42 (2016); Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 297–303 (2012); and Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573, 583 (2010).

likely to be heard and valued, rather than just dismissed as off-script in a congressional hearing designed to attract partisan media attention.

The contrast between these hypothetical local and national responses highlights the way that the cooperative federalism²⁵⁶ at work in crime-based deportation invites an immigration response, at *both* the national and local level, to every lurid immigrant crime. The multitude of overlapping “cooperative” enforcement actors multiplies the number of sites where enforcement partisans can point to enforcement failure and governmental incompetence. The multiplicity of actors to blame exacerbates the sense of disorder and lack of control that immigrant crimes make salient.²⁵⁷ With responsibility so divided and opaque, the commission of a lurid immigrant crime sends the message that no level of government is accountable on this issue. Local sovereignty would channel any post-crime traction for reform into a governmental body that has the fine-grained local knowledge to calibrate a nuanced and measured local response.

National control also undermines unconditional membership by framing sanctuary jurisdictions as wrongful departures from legitimate federal commands. With no *express* room for local deviation from national deportation mandates, cooperative federalism in crime-based deportation structurally delegitimizes sanctuary jurisdictions by framing local preferences on crime-based deportation as a breach of the rule of law.²⁵⁸ The facial uniformity of immigration federalism paints sanctuary cities as outlaws defying national prerogatives, rather than path-breakers legitimately raising the floor of immigrant rights

²⁵⁶ See Gerken, *supra* note 243 and accompanying text.

²⁵⁷ In prior work, I have explored at length the psychology of citizens who favor stronger immigration enforcement. See Morales, *Democratic Will*, *supra* note 20, at 78–82 (outlining aspects of the “siege mentality” of citizens that motivates them to support harsh immigration measures to reclaim a sense of control).

²⁵⁸ The President has seized on this framing, as has right-wing media. See Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8801 (Jan. 30, 2017) (authorizing the Attorney General to “take appropriate enforcement action” against jurisdictions it determines are sanctuary jurisdictions and that have statutes, policies, or practices that prevent or hinder enforcement of federal immigration laws); see also Lana Shadwick, *DOJ Watchdog Issues Report Finding Sanctuary Cities, States Illegal*, BREITBART (July 30, 2016), <http://www.breitbart.com/texas/2016/07/30/doj-watchdog-issues-report-finding-sanctuary-cities-states-illegal/> (reporting that a DOJ Inspector General report held sanctuary jurisdictions to be in violation of federal law); Jan C. Ting, *Sanctuary Cities Must Cooperate with Federal Enforcement*, N.Y. TIMES (Dec. 1, 2016), <http://www.nytimes.com/roomfordebate/2016/12/01/do-sanctuary-cities-have-a-right-to-defy-trump/sanctuary-cities-must-cooperate-with-federal-enforcement> (arguing that local law enforcement’s refusal to cooperate with federal immigration officials is a threat to public safety).

within the bounds of their jurisdictions. Lodging sovereignty over crime-based deportation at the local level erases these issues.

Of course, as at the national level, some crimes will trigger a local reassessment of local crime-based deportation law and policy. And surely some local norm entrepreneurs will adopt the scorched-earth positions that turn up routinely at the national level; but in areas that have the underlying dynamics—large immigrant populations, a global outlook—to make sanctuary commitments,²⁵⁹ such events are far more likely to result in no action or recalibration, rather than wholesale abandonment of unconditional membership. As this Article has shown, resisting the urge to deport noncitizens who commit crimes requires communities and their politicians to embrace them as members and to look at the relationship between immigrants and crime in a nuanced way. The sanctuary commitment itself settled the membership question.

The nuance comes from the structural characteristics of local governments. Localities know in their bones the way that immigration lowers per-capita crime rates, for instance.²⁶⁰ And because crime control is an issue for which local actors are held accountable by the electorate, local officials are far more likely to value the cooperation purchased with the embrace of migrants' human frailty than they are to value whatever abstract and marginal gains are available from increasing crime-based deportations.²⁶¹

Even so, lurid immigrant crimes may require a recalibration of commitments to unconditional membership, but again, localized policymaking would offer advantages over national control here. Laws and policies made in such moments would also be easier to roll back, since national consensus—not to mention bicameral passage and presidential presentment—would not be required to make such changes. Moreover, unlike in Congress, where crime-based deportation is one of many issues on which Congress could spend its time and expertise, crime control is a core function of local governments, and a core

²⁵⁹ Urban jurisdictions with high immigrant populations lead the way on sanctuary commitments. *See supra* note 255 and accompanying text (describing some sanctuary jurisdictions); *see also* Jason Le Miere, *Sanctuary Cities 2016: Full List of Places Resisting Donald Trump's Immigration Pledge*, INT'L BUS. TIMES (Dec. 16, 2016), <http://www.ibtimes.com/sanctuary-cities-2016-full-list-places-resisting-donald-trumps-immigration-pledge-2458735> (listing cities that have declared themselves sanctuary jurisdictions).

²⁶⁰ By this, I simply mean that localities are more apt to understand the positive relationship between immigrants and lower crime rates described by Robert Sampson because they are closer to the problem and held accountable locally for local crime rates. *See* SAMPSON, *supra* note 76.

²⁶¹ That sanctuary jurisdictions have engaged in uncooperative federalism suggests that these underlying dynamics are in place.

source of local expertise and voter accountability. This focus, and the closer tie of local governments to their constituents—including large noncitizen populations—ought to mean that reversing anti-immigrant recalibrations would be substantially easier to accomplish under a system of local sovereignty²⁶² than it is at the national level, where the evidence shows clearly that the ratchet of legal change has run consistently in the direction of harsher, less humane treatment.²⁶³ California was once at the leading edge of anti-immigrant politics. Its local and state anti-immigrant innovations were then translated into radical changes in national law, such as requiring all persons to show proof of legal residency in the United States in order to work.²⁶⁴ These California-tested, nationally adopted laws are still in the U.S. Code, better enforced than ever by a fortified national immigration enforcement apparatus.²⁶⁵ Meanwhile, California has flipped: It is now at the vanguard of immigrants' rights.²⁶⁶

Finally, local governments that have embraced sanctuary commitments have already adopted a rhetoric and policy of noncitizen inclusion that attracts people—citizens and noncitizens alike—who will help sustain those commitments. The population selection bias of pro-immigrant locales would only become stronger under a regime of local crime-based deportation sovereignty, and that population will help make commitments to unconditional membership self-sustaining.²⁶⁷

²⁶² California's shift from being the standard bearer of anti-immigrant politics in the mid 1990s to the model of a sanctuary state in 2016, while Congress remains deadlocked, exemplifies this point. See notes 46–49 and accompanying text.

²⁶³ See García Hernández, *supra* note 233, at 1372–73 (outlining the effect of the “War on Drugs” on drastically changing penal norms and concomitant growth in the use of detention); Morales, *Democratic Will*, *supra* note 20, at 66–74 (surveying legal changes that indicate how the immigration regime grows harsher over time).

²⁶⁴ See Su, *supra* note 47 and accompanying text.

²⁶⁵ *Id.* at 1368 & n.132 (citing 8 U.S.C. § 1324a (2012)).

²⁶⁶ See Feliz, *supra* note 49.

²⁶⁷ Mary Fan has argued that unconditional membership is impossible to achieve because citizens are divided between two basic and irreconcilable psychological types, egalitarians and hierarchs. Fan, *supra* note 8, at 83–95. Egalitarians would favor unconditional membership, while hierarchs favor more deportation for criminal acts. Fan is absolutely right that the “clashing worldviews” between these two psychologies foreclose one-sided reform—unconditional membership—at the national level. But, since it is doubtful that hierarchs and egalitarians are distributed evenly in American geography, local control opens up new possibilities for egalitarian rule—unconditional membership—in some localities. Sanctuary commitments themselves are evidence of an egalitarian majority in those jurisdictions. Indeed, egalitarians are often attracted to city living because it is compatible with the egalitarian worldview. The differences in local psychological compositions have likely become more marked, even profound, in the last three decades as citizens have sorted themselves geographically with like-minded people. See Chen & Rodden, *supra* note 183, at 241 (showing how the high concentration of Democrats in urban jurisdictions has led to them being underrepresented in congressional seats).

C. *The Humanity of the Local, and the Abstraction of the National*

In mid-October 2013, in Forest Grove, Oregon (an exurb of Portland), two sisters were playing outside on the quiet street in front of their house in piles of fallen autumn leaves while their father photographed the happy scene.²⁶⁸ Finished, he went inside to put away his cameras.²⁶⁹ While he was gone, the girls continued playing in the piles of leaves, but when their father returned, he found one girl dead and the other severely injured.²⁷⁰ They had been hit by a car driven by nineteen-year-old Cinthya Garcia-Cisneros, an undocumented immigrant who arrived in the United States as a minor and had been granted temporary legal status under President Obama's Deferred Action program.²⁷¹ Cinthya didn't realize she had hit the girls—they were hidden in the leaves—and continued home after doing so, thinking she had hit a rock or a log or some other inanimate obstacle in the roadway.²⁷²

After Cinthya had returned home in the car, her younger brother left the house for a bike ride.²⁷³ He came back quickly telling her, "I think that you hit a child."²⁷⁴ The revelation sent Cinthya into a panic. "When could I have hit a child? I didn't see a child. . . . I kept trying to think it could have been a rock or anything else, but not kids," she said.²⁷⁵ "I kept telling myself that I didn't see anything. I didn't see children, I didn't see toys, I didn't see parents, I didn't see any signs of there being a child," she testified at her trial.²⁷⁶ The next morning, Cinthya awoke as if from a nightmare.²⁷⁷ She went about her business in the morning, but by noon the police arrived to arrest her.²⁷⁸ Cinthya was ultimately charged and convicted of two counts of felony hit and run.²⁷⁹ The prosecution did not contest that Cinthya unknow-

²⁶⁸ Rebecca Woolington, *Forest Grove Fatal Crash: Suspects Arrested at Cornelius Home; Neighbors Express Shock*, OREGONIAN (Oct. 23, 2013), http://www.oregonlive.com/forest-grove/index.ssf/2013/10/forest_grove_fatal_crash_suspe.html.

²⁶⁹ *Id.*

²⁷⁰ Emily E. Smith, *Forest Grove Fatal Crash: For Teen Charged with Hit and Run, 'Difficult Times Are Here,'* OREGONIAN (Oct. 25, 2013), http://www.oregonlive.com/forest-grove/index.ssf/2013/10/forest_grove_fatal_crash_for_t.html.

²⁷¹ *Id.*

²⁷² Emily E. Smith, *Cinthya Garcia-Cisneros, Charged in Fatal Hit-and-Run: 'I Kept Telling Myself that I Didn't See Anything,'* OREGONIAN (Jan. 15, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/01/cinthya_garcia-cisneros_charge.html.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Woolington, *supra* note 268.

ingly hit the girls, but argued that she acted criminally in failing to report once she learned of the incident from her brother.²⁸⁰

What happened next showcases the capacity of local communities to have conversations about noncitizen crime that accept the human frailty of noncitizens and embrace the noncitizens as members of the community. After Cinthya expressed remorse for her actions at sentencing,²⁸¹ the children's mother told Cinthya, "I forgive you, I do. . . . I don't want you to spend any more time in jail. . . . Live a life of honoring my girls,"²⁸² and asked that the judge give Cinthya probation rather than a prison term.²⁸³

The criminal law judge obliged, but the victims' family did not immediately get their wish to have Cinthya return to their community; national immigration authorities stepped in to take her into immigration custody while she awaited a deportation hearing.²⁸⁴ An immigration judge then denied Cynthia's bond, finding her to be a danger to the community and a flight risk, ignoring a packed room of local *community* members who had come to support Cynthia's release: "Former teachers, family members, the victim's parents and others sent letters to the [immigration] judge on [Cinthya's] behalf."²⁸⁵ The letters said: "Three months in the county jail awaiting trial, three years of probation, that is punishment enough. . . . Mexico is another world. It might be her home soil, but it is not her home."²⁸⁶ It was to no avail. The judge, applying the laws of the self-interested state, thought differently.

Eight months later—while she was still in immigration detention—Cynthia had her immigration hearing and was granted relief from deportation.²⁸⁷ On the day of Cinthya's release from immigra-

²⁸⁰ Emily E. Smith, *Cinthya Garcia-Cisneros, 19, Sentenced to Probation in Forest Grove Fatal Crash*, OREGONIAN (Feb. 1, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/01/cinthya_garcia-cisneros_19_sen.html.

²⁸¹ *Id.*

²⁸² Emily E. Smith, *Cinthya Garcia-Cisneros, Sentenced in Forest Grove Fatal Crash, Exchanges Words of Remorse, Forgiveness*, OREGONIAN (Jan. 31, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/01/cinthya_garcia-cisneros_senten.html.

²⁸³ *Id.*

²⁸⁴ Emily E. Smith, *Cinthya Garcia-Cisneros, Convicted in Fatal Forest Grove Crash, Loses Bid for Release in Immigration Court*, OREGONIAN (Mar. 19, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/03/cinthya_garcia-cisneros_loses_release_bond.html.

²⁸⁵ *Id.*

²⁸⁶ Emily E. Smith, *Cinthya Garcia-Cisneros Talks from Immigration Jail About Awaiting Her Fate After Deadly Forest Grove Crash*, OREGONIAN (Mar. 25, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/03/cinthya_garcia-cisneros_interv.html.

²⁸⁷ Samantha Swindler, *Cinthya Garcia-Cisneros, Sentenced in Forest Grove Fatal Crash, Released from Immigration*, KGW Reports, OREGONIAN (Aug. 19, 2014), <http://>

tion custody and return to the community, the family of the victims released two statements:

We are relieved to hear that Cinthya has been released and can now serve out her sentence of community service hours. With her return to her hometown, true healing for all of those involved in and affected by this accident can really begin. We hope that the same community support and care that has been shown to us through this grieving period will also be extended to Cinthya and her family.²⁸⁸

The mother who forgave Cinthya in court wrote:

Today is like any other day without our girls. Through our grief we have chosen to love and celebrate the joy that they have brought into our lives and the lives of so many others. We don't want Anna and Abigail's lives to be remember[ed] by the tragedy, but rather by the love story they are all teaching us to live.²⁸⁹

This is one version of what confronting and embracing noncitizen's human frailty can look like. It is a version stripped of legal membership categories, of abstractions like citizen and alien, guilt and innocence, criminal and law-abiding. Instead, those affected by the accident, along with the broader community, negotiated the consequences of a devastating event: the loss of a child—a fact which neither Cinthya's incarceration nor her deportation could undo. In this encounter between victim and noncitizen perpetrator, and the conversation among the local community, the community chose membership for Cinthya and restraint in the use of the power to deport. These kinds of small-scale encounters and local conversations illustrate how unconditional membership can grow and develop, democratically and organically. This is a story about norm-development that is only possible at the local level.

After all, we also saw what happened when the same story, facts, and community encountered the national immigration apparatus. Whereas the criminal law judge plainly took the wishes of the community and the victims' family to heart when he sentenced Cinthya to probation, the immigration judge at the immigration bond hearing ignored the local evidence that Cinthya was not dangerous or a flight risk. Instead, one may surmise that the judge was considering the calculus of the self-interested state that he serves—not the local com-

www.oregonlive.com/forest-grove/index.ssf/2014/08/cinthya_garcia-cisneros_senten_1.html#incart_river.

²⁸⁸ Edwin Rios, *Cinthya Garcia-Cisneros Could Participate in Adelante Mujeres Restorative Justice Program*, OREGONIAN (Aug. 20, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/08/as_families_of_two_forest_grov.html.

²⁸⁹ Edwin Rios, *Family of Two Forest Grove Girls Killed in Hit and Run Crash Speaks, Following Cinthya Garcia-Cisneros' Release*, OREGONIAN (Aug. 19, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/08/family_of_two_forest_grove_gir.html.

munity. In that calculus, the small risk of Cinthya absconding to somewhere else in the United States, where she has no history or community, had to be vindicated. To the immigration judge, her case is likely indistinguishable from other immigration cases and similar stories. Why take the risk that she will escape the justice of immigration law? After all, it costs the immigration judge nothing. The nation's expansive detention apparatus has space for Cinthya. Why not have her wait in detention, just to be sure that the self-interested state can secure a marginal gain—the deportation of a criminal alien?

Ultimately, the self-interested state stayed its hand, bowing perhaps to local prerogatives. But we should not conclude from this rare act of grace that the self-interested state could effect a nationwide policy of unconditional membership.²⁹⁰ Cinthya's immigration attorney reclaimed her deferred action grant through effective advocacy²⁹¹—something most noncitizens do not have access to. But even if every noncitizen had a lawyer, the problems of the citizen-governed self-interested state remain. A national conversation about forgiveness could easily miss or erase what a local community like Forest Grove could see and accept: Cinthya's human frailty and membership in the community. And indeed, this is what happened in the aftermath of Cynthia's relief from deportation. In the *National Review* and on Fox News's *The O'Reilly Factor*, the granular, local knowledge of Cinthya's story was stripped away and flattened. On *The O'Reilly Factor*, conservative pundit Laura Ingraham said:

We have two dead girls. We have two felony hit-and-run counts convicted. . . . If you're a legal, American green card holder, you're a legal immigrant in the country and you commit a felony, you're instantly deportable We have special status to these so-called DREAMers. She DREAMed her way right into running over these two girls. I'm glad the parents feel bad for her. But this just shows us this whole DREAMer thing is a big farce.²⁹²

Notice the aggressive assertion of categories and the erasure of the local membership status negotiated by Cinthya's community.

²⁹⁰ Arguably, President Obama's grants of deferred action status to a portion of the undocumented population embodied a nationwide act of grace, but granting status in this way was legally problematic and democratically suspect, potentially undermining the possibility of forgiveness over the long run. For further discussion, see Morales, *Democratic Will*, *supra* note 20, at 53–57.

²⁹¹ Luke Hammill, *Cinthya Garcia-Cisneros Released From Jail, Can Get Work Permit and Social Security Number*, OREGONIAN (Aug. 19, 2014), http://www.oregonlive.com/hillsboro/index.ssf/2014/08/cinthya_garcia-cisneros_releas.html#incart_river.

²⁹² Edwin Rios, *The O'Reilly Factor Takes on Dismissal of Cinthya Garcia-Cisneros Immigration Case*, OREGONIAN (Sept. 3, 2014), http://www.oregonlive.com/forest-grove/index.ssf/2014/09/the_oreilly_factor_takes_on_ci.html.

What matters for Ingraham is not the actual question of Cinthya's dangerousness to the community, or the nation, but rather, the sanctity of legal categories. DREAMers like Cinthya, brought as children to the United States in violation of the law are being treated better than "green card holder[s],"²⁹³ who followed the immigration rules. The need to assert this categorical hierarchy is, in itself, reason enough to deport Cinthya, who would have been deported anyway but for President Obama's failure to recognize these categorical imperatives when he granted Cinthya provisional legal status. Or, as the *National Review* put it in a column headlined *No Prison Time, No Deportation for Illegal Immigrant Who Killed Two Girls*²⁹⁴: "Laws for ordinary Americans are harsher than ever, while illegal immigrants are absolved of crimes with a slap on the wrist and deportation proceedings canceled. Bienvenidos a America."²⁹⁵

Crime-based deportation law, and the national conversation that makes that law, erases, rather than embraces human frailty. National digestion of immigrant crime leads predictably and inevitably to this sort of dehumanizing abstraction. Local control, of course, can end up in the same place, but the smaller scale of local institutions, and the diversity and flexibility of their various cultures,²⁹⁶ helps to facilitate decisionmaking that can look past labels to see the humanity—the human frailty—of noncitizens with criminal convictions. Unconditional membership can emerge out of this kind of fine-grained local process, not the national conversation about the needs and demands of the self-interested state.²⁹⁷

D. Fortifying Sanctuary Cities Alongside Sovereign Citadels

If there are possibilities in local control, there are also costs to embracing local sovereignty over crime-based deportation. To unleash the possibility of unconditional membership in sanctuary cities requires relinquishing territory to its opposite: to "sovereign citadels,"

²⁹³ *Id.*

²⁹⁴ A.J. Delgado, *No Prison Time, No Deportation for Illegal Immigrant Who Killed Two Girls*, NAT'L REV. (Aug. 21, 2014), <http://www.nationalreview.com/article/386009/no-prison-time-no-deportation-illegal-immigrant-who-killed-two-girls-j-delgado>.

²⁹⁵ *Id.* (emphasis omitted).

²⁹⁶ See HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* 53–85 (2013) (describing how the diverse ways of knowing among the citizenry produce systematically better political policy than rule by an expert few). Following Landemore, a more distributed power structure with different kinds of diversity in different jurisdictions is more likely to produce good policies in some jurisdictions than would a single power structure, i.e., the federal government.

²⁹⁷ See Morales, *Democratic Will*, *supra* note 20, at 85–93 (discussing the reasons why a bottom-up approach is required to achieve lasting, immigrant-friendly immigration reform).

like Maricopa County, and its former sheriff Joe Arpaio.²⁹⁸ This fear of unleashing exclusionary local practices is the signal reason why most crimmigration scholars would reject a devolution of power out of hand. But this fear is grounded in part in a misreading of the cause of local anti-immigrant laws.

The distrust of local power and underestimation of local possibilities is anchored in the idea that a local expression of the immigration restrictionist movement reflects the true, fixed, and biased democratic will of the local populace which passed the restrictionist law. The only way to protect immigrants from pervasive local hostility, then, is to quash such laws in court by any means necessary and maintain centralized control.²⁹⁹ But these expressions of anti-immigrant animus are better viewed as the distorted democratic product of cooperative immigration federalism. The binding together of national and local corrupts the possibility of a truly local immigration politics; an immigration politics of neighbor, classmate, and churchgoer, rather than citizen, alien, and nation-state.³⁰⁰

Gulasekaram and Ramakrishnan use empirical data to support their position that increases in immigration levels in a particular jurisdiction do not predict whether or not a particular locality adopts anti-immigrant laws.³⁰¹ Rather, adoption of anti-immigrant laws is better predicted by the percentage of Republican voters in a particular municipality, as well as the presence or absence of an entrepreneurial politician seeking higher state or national office.³⁰² What if we change the political game by taking crime-based deportation out of the national domain? Under conditions of local sovereignty on these matters, we can reasonably expect more communities—including sover-

²⁹⁸ See Itkowitz, *supra* note 44.

²⁹⁹ See Morales, *Democratic Will*, *supra* note 20, at 58 (discussing the national hazards of quashing local anti-immigrant rebellions with preemption arguments).

³⁰⁰ Nancy Rosenblum warns against the easy conflation of the categories of citizen and neighbor even as she argues that the American neighborly ethic is a potent political force, “a compass for maintaining our democratic bearings when organized aspects of social and political life have lost their integrity or simply do not make sense to us . . . [and] the last . . . station of the democratic ethos, a bulwark against its disappearance rooted deeper even than a public culture of rights.” See ROSENBLUM, *supra* note 25, at 245–46, 248. The power of this bulwark is evident in local reactions to Donald Trump’s deportation crackdown. See *supra* Part II. Moreover, Rosenblum’s depiction of the way that nationalism can deform neighborly life, see ROSENBLUM, *supra* note 25, suggests that in the immigration context, where nationalism is currently omnipresent, there is a need to deemphasize nationalism in favor of neighborliness.

³⁰¹ GULASEKARAM & RAMAKRISHNAN, *supra* note 230, at 207–08.

³⁰² See *id.* at 87–118 (theorizing that under the conditions that have prevailed in federal immigration policy, restrictionist immigration legislation is generated by “issue entrepreneurs” who make a name for themselves nationally by promoting anti-immigrant legislation locally).

eign citadels and their leaders—to embrace more moderate outcomes³⁰³ that are more responsive to local conditions, perceptions, and needs.³⁰⁴ Consider, for instance, the circumstances that lead to the deportation of Akio and Fukado Kawashima in 2012 after losing six to three in the Supreme Court.³⁰⁵ The Kawashimas immigrated to Southern California in 1984 and eventually became lawful permanent residents, although they never naturalized. Shortly thereafter, the couple opened a successful chain of sushi restaurants in the San Fernando Valley, west of Los Angeles.³⁰⁶ In 1991, they significantly underreported their business income to the Internal Revenue Service (IRS) and were prosecuted in 1997 for filing a false tax return; they paid in full the \$245,000 they owed in back taxes and penalties.³⁰⁷ In 2001, the Immigration and Naturalization Service (INS) initiated deportation proceedings against the Kawashimas, arguing that their tax convictions were “aggravated felonies” that rendered the couple

³⁰³ Local sovereignty over this question will in most cases lead to a higher amount of public accountability. As Elina Treyger emphasizes, most sovereign citadels have aggressive crime-based deportation policies as a result of the cumulated decisions of local police officers or non-public directives of police administrators, or agreements to become arms of the federal government. Treyger, *supra* note 15, at 155–60. A move towards local sovereignty would expand public accountability over this issue, since local sovereignty entails legislating a local prescription, rather than acting aggressively under the guise of being the federal government’s loyal servant. That said, some localities will surely issue crime-based deportation policies that are draconian. But so long as other spaces exist that are moderately or very accommodating, and so long as noncitizens can select for different policies by moving to other localities, I do not see why the existence of these extremes is so much more offensive than the status quo.

There is an implicit assumption in immigration scholarship that noncitizens are entitled to the same level of freedom of movement as citizens, but there is no obvious reason that this is so. Implicit in the fear of granting local control is the idea of noncitizen’s freedom of movement within the United States being curtailed. I would gladly trade freedom of movement for higher immigration levels to pro-immigrant areas of the United States. I suspect that immigrants themselves would make the same trade.

³⁰⁴ Achieving denationalization in a settled way would be challenging, though I believe the benefits of local control are significant enough to merit bargaining away other progressive immigration goals to achieve denationalization in this area. Additionally, a stable denationalized system becomes more imaginable when we consider devolving all but the national security-related aspects of the immigration power down to states, localities, or metro areas. Indeed, some immigration power is already delegated to states and localities through § 287(g) agreements, which allow states and local entities to enter agreements delegating certain immigration enforcement actions to state and local officers, although admittedly exclusively in an anti-immigrant direction. 8 U.S.C. § 1357(g) (2012). Still, a fuller devolution, which would allow subnational entities to wield significant power over local immigration levels in either direction, may be more amenable to achieving a settled denationalization of crime-based deportation.

³⁰⁵ *Kawashima v. Holder*, 565 U.S. 478 (2012).

³⁰⁶ David Savage & Catherine Saillant, *Legal Immigrants Face Deportation for Filing False Tax Return*, L.A. TIMES (Feb. 26, 2012), <http://articles.latimes.com/2012/feb/26/local/la-me-0226-deport-tax-20120226>.

³⁰⁷ *Id.*

deportable.³⁰⁸ Another decade passed before the Kawashimas received final word from the Supreme Court that, based on a picayune interpretation of the aggravated felony statute, they would be deported.

Had localities in the San Fernando Valley set law and policy on crime-based deportation, there is little doubt that the outcome for the Kawashimas would have been different. The value of the Kawashimas as small business owners over decades would be weighed against the fact that they committed a *malum prohibitum* crime and paid in full the penalty for doing so. But even if the Kawashimas lived in Maricopa County, or some other sovereign citadel, it seems unlikely that the local outcome would be the same as the actual outcome of the Kawashimas' case on the federal level. What sense would it make for a locality to deport the Kawashimas, who are obvious net contributors to the local community? Yet, because of national control, abstract notions like "the national interest" and "the rule of law" are given primacy in the decision to deport, and the Kawashimas' locally significant economic and social contributions fail to register in the trillion-dollar scale national economy.

Another misapprehension in the reflexive aversion to full local control over crime-based deportation is the underestimation of the deliberative democratic potential of local politics and the power of immigrants' rights movements to fight back in the political arena. Recall that California was at the vanguard of *anti-immigrant* politics in the 1990s.³⁰⁹ Now, of course, California is the brightest hope for unconditional membership. At every level of elected office, California politicians have denounced Donald Trump's ascension to the presidency as deeply at odds with the multicultural, nascent-unconditional ethic that California embodies.³¹⁰ But California's commitment to immigrants was won the hard way—through grassroots organizing and door-to-door persuasion over many years,³¹¹ by Californians coming to understand the reality that immigrants do not threaten their interest, and that immigrants are a part of what makes California

³⁰⁸ Kawashima, 565 U.S. at 480–81.

³⁰⁹ See Bosniak, *supra* note 46.

³¹⁰ Kyung Lah, *California Dems Ready to Fight Trump's Immigration Plans*, CNN (Dec. 22, 2016), <http://www.cnn.com/2016/12/22/politics/california-immigration-donald-trump/>.

³¹¹ Manuel Pastor, *How Immigrant Activists Changed L.A.*, DISSENT (2015), <https://www.dissentmagazine.org/article/how-immigrant-activists-changed-los-angeles> (attributing changing immigration politics in Los Angeles in part to the immigrant rights' movement: It was "not simply demographic change . . . that helped Villaraigosa become [Los Angeles's] first Latino mayor since 1872. After all, while the city went from 39 percent Latino in 1990 to 47 percent in 2000, the election of Villaraigosa occurred in a decade during which the percentage of Latinos barely budged.").

great.³¹² Similarly, the electoral defeat of Sheriff Joe Arpaio—the *bête noir* of immigrants’ rights advocates—for re-election in Maricopa County, Arizona,³¹³ even in an election where Trump sailed into office after co-opting Arpaio’s rhetoric,³¹⁴ shows how local organizing and activism can overcome even the most dogged, creative, and determined anti-immigrant adversaries.

Of course, anti-immigrant activists in Arizona gave up thousands upon thousands of hours of their lives to defeating Sheriff Arpaio. But that person-to-person, door-to-door retail democratic work of persuading your neighbors that “illegal” immigrants are *also* their neighbors is a durable, stable, and valuable deposit in the bank of unconditional membership. This local work on hearts and minds may be just as important as the immediate gratification offered by President Obama’s unilateral imposition of the unconditional ethic at the national level, when he granted some noncitizens who had entered the United States outside the law a reprieve from deportation.³¹⁵ After the 2016 election of Donald Trump, we might even be inclined to see President Obama’s executive actions as a democratic shortcut that cut off more durable, ethic-forming persuasive work, and catalyzed a revanchist national reaction.³¹⁶

³¹² Tellingly, whites in California voted differently from peers in other blue states. See, e.g., Emily Badger, *Immigrant Shock: Can California Predict the Nation’s Future?*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/upshot/strife-over-immigrants-can-california-foretell-nations-future.html>.

³¹³ See Itkowitz, *supra* note 44 (discussing how the campaign to oust Sheriff Arpaio “registered thousands of new voters” under the slogan “Love Against Hate,” encouraging undocumented immigrants to “come out of the shadows and tell their stories,” enabling change that occurs only when people “put a human face to an issue”).

³¹⁴ See *id.* (“Trump, in turn, lavished praise on Arpaio, telling a crowd in late October, ‘He is a good man, he was one of the first endorsers of Donald Trump. Vote for Sheriff Joe!’”).

³¹⁵ See Memorandum from Janet Napolitano, Sec’y, Dep’t Homeland Sec., to David V. Aguilar, Comm’r, U.S. Customs & Border Prot., et al. 1–3 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (implementing program granting work authorization and deferring removal proceedings for certain undocumented people who came to the U.S. as children—colloquially known as Deferred Action for Childhood Arrivals (DACA)); Memorandum from Jeh Charles Johnson, Sec’y, Dep’t Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 1–5 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (expanding DACA eligibility and developing a similar program for the undocumented parents of certain U.S. citizens or lawful permanent residents). *But see* Texas v. United States, 86 F. Supp. 3d 591, 676–77 (S.D. Tex. 2015), *aff’d*, 787 F.3d 733 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016) (enjoining the expansion of deferred action beyond certain undocumented people brought to the United States as children and specifying that deferred action for that initial group was not being challenged).

³¹⁶ See Morales, *Democracy’s Shadow*, *supra* note 221 at 61–67 (describing why immigrant rights movements cannot follow the template of other civil rights movements).

What if unconditional membership cannot emerge out of local devolution? Given the grim national situation for immigrants today, I do not believe immigrants would be worse off under a decentralized system, especially because immigrants could “vote with their feet”³¹⁷ and move to more favorable jurisdictions.

But I am also open to the possibility that I am wrong about my conviction that a system approaching unconditional membership is compatible with maintaining a thriving local and national community, and that local citizens can be persuaded of that fact. If I am wrong, then the key takeaway from this Article’s analysis is that unconditional membership is fundamentally incompatible with citizen-based control of crime-based deportation policy, no matter what level of government it is lodged in.

CONCLUSION

National control was not always so dehumanizing and “abstract.” Congress itself used to routinely pass private bills granting reprieves to otherwise deportable migrants.³¹⁸ Immigrants would make their individual cases to their local congressperson, who would then submit to the floor a bill granting status and ensure that the bill would be ratified and signed by Congress as a matter of comity.³¹⁹ The immigration enforcement agencies had far more power in the past to grant status to longtime undocumented immigrants or offer reprieves from crime-based deportation, either on an individualized or group basis.³²⁰ But the idea of the self-interested state has made inroads at the national level. It has become entrenched in law, policy, and in the congressional mindset on both sides of the aisle, not to mention in the law and in the policies of immigration enforcement agencies.³²¹

³¹⁷ See Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL’Y 202 (2011) (arguing that a person may exercise political judgment by deliberately choosing a state or locality to live in); see also Ilya Somin, *Taking Dissenting by Deciding All the Way Down*, 48 TULSA L. REV. 523, 527–28 (2013) (building on Heather Gerken’s federalist espousal of local empowerment by recognizing minority populations’ “foot voting,” exercising exit power by simply leaving the jurisdiction); Treyger, *supra* note 15, at 142 (arguing that noncitizen movement from an anti-immigrant to pro-immigrant jurisdiction is positive).

³¹⁸ See generally Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273 (2004) (describing this practice).

³¹⁹ Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 697–98 (2003); see also Thomas Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, *Immigration and Citizenship: Process and Policy* 787 (4th ed. 1998).

³²⁰ See Morawetz, *supra* note 9 (discussing how the 1996 immigration reform laws drastically limited the discretion of immigration judges).

³²¹ See, e.g., Nixon, *supra* note 70 and accompanying text.

To be sure, local autonomy over crime-based deportation poses its own knotty problems, which I will address in more depth in future works exploring the decentralization of the immigration power. But the point of this Article is that it is a mistake to think that national reform and administration could lead to unconditional membership. National institutions and the national conversation on crime-based deportation are structured in such a way that they do systematic violence to that possibility. Local autonomy over crime-based deportation offers a more promising set of possibilities.

